

**COMPARATIVE ANALYSIS OF LEGAL FRAMEWORKS
PERTAINING TO EXCHANGE OF INFORMATION AND
MUTUAL ASSISTANCE BETWEEN
CANADA AND U.S. AUTHORITIES**

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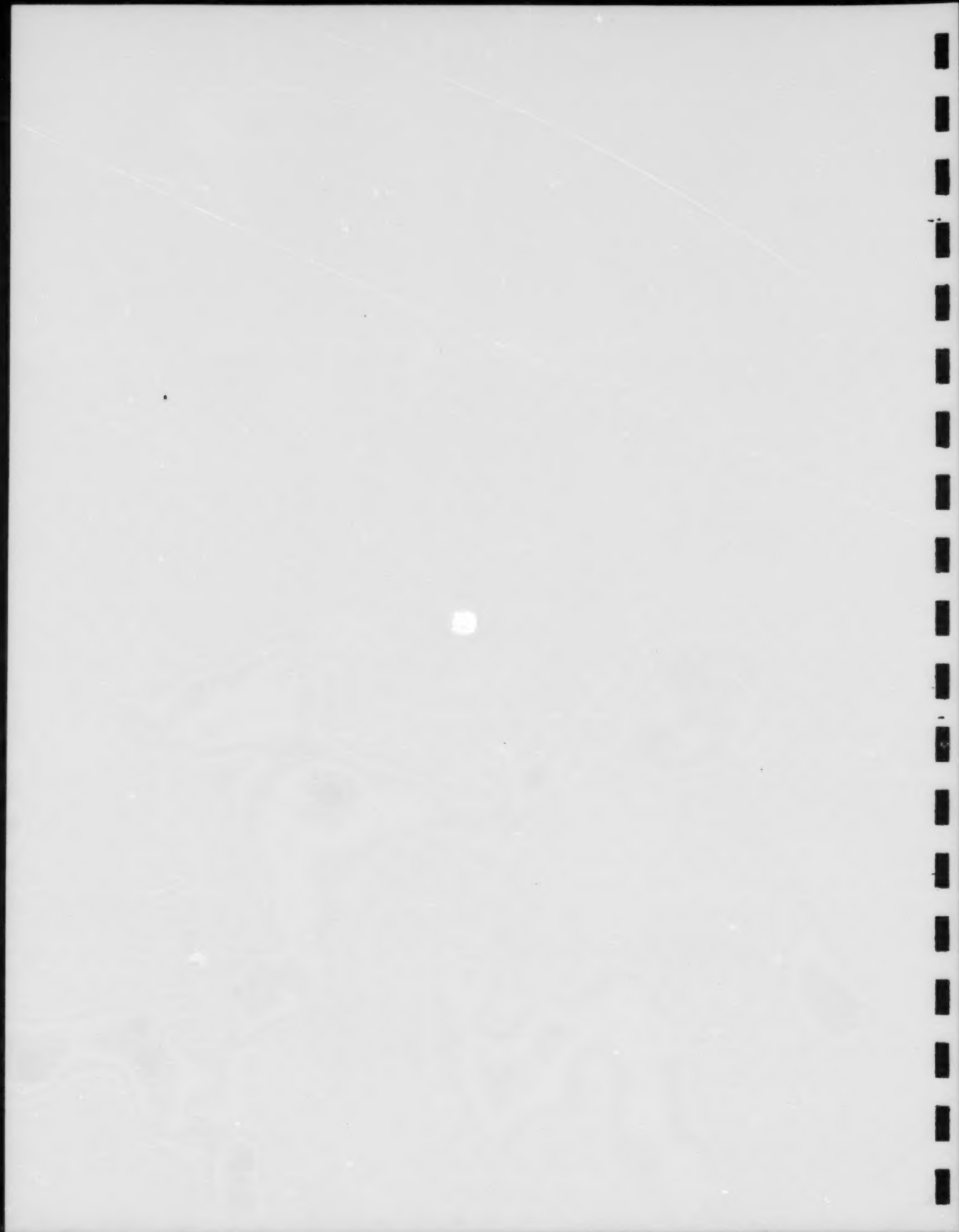
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EXECUTIVE SUMMARY

This paper examines the existing mechanisms for the exchange of information and mutual assistance between the governments of Canada and the USA in areas of securities and income tax law. The analysis which follows provides the context for considering proposals to establish similar confidentiality and mutual assistance practices between Canadian and American anti-trust authorities.

In criminal matters, there is a legislative framework in place to support mutual assistance and the exchange of information between Canadian and U.S. authorities. The Mutual Legal Assistance Treaty ("MLAT") and the *Mutual Legal Assistance in Criminal Matters Act* ("MLACMA") provide a procedure and contractual arrangement for legal assistance and the exchange of information. In civil matters, however, there is no comprehensive regime governing the exchange of information and assistance. The Competition Bureau is considering legislative proposals which would articulate its authority to communicate with foreign authorities in matters relating to the civil provisions of the *Competition Act*, that is, with respect to mergers and reviewable matters (anti-competitive conduct and deceptive marketing practices). As a preliminary step, the Competition Bureau commissioned this study, which provides a comparative analysis of current law and practice concerning mutual assistance and the exchange of information between Canadian and U.S. authorities in the areas of securities and tax law.

Securities being a matter of provincial jurisdiction in Canada, this study considers the memoranda of understanding currently in effect between the U.S. Securities Exchange Commission and the provincial securities commissions in Ontario and Quebec. In the area of tax law, the exchange of assistance and information is governed by the Canada-U.S. Tax Convention, and by guidelines internal to Revenue Canada and the Internal Revenue Service respectively. The over-arching conclusion is that current arrangements give the authorities wide discretion in the exchange of information with their counterparts on the other side of the international boundary. The arrangements generally contain definitions and safeguards concerning confidential information and its disclosure to third parties, but with certain very limited exceptions, there is no requirement for judicial authorization either to request or provide information.

As noted above, securities in Canada is a provincially regulated jurisdiction. This report focuses on the securities laws of Quebec and Ontario. The rules on mutual assistance are set forth in the securities acts of such provinces to the extent that both grant the securities commissions with the authority to assist foreign jurisdictions with a request for information. Furthermore, the U.S. Securities and Exchange Commission, the Ontario Securities Commission, the Quebec Securities Commission and the British Columbia Securities Commission have entered into a Memorandum of Understanding intended to facilitate and foster mutual assistance among those jurisdictions. The Memorandum of Understanding highlights the intent of the parties to provide the fullest mutual assistance possible for investigations, litigation and prosecutions. The Memorandum of Understanding does not regulate how the information will be exchanged but more importantly sets forth the intention of the parties.

The rules regulating the exchange of information in the area of securities law have developed informally through practice. Essentially, all information is exchanged pursuant to a request either on an informal basis or more formally depending upon the type of information requested. In no instance, however, is judicial authorization required either to make a request for information from a foreign authority or to transmit the information to the requesting authority. Information which is in the files of the particular securities commission, either because it is public information or information which was voluntarily-provided pursuant to an investigation, is permitted to be exchanged by the staff person of the securities commission without any further formality. Should the information requested constitute information which was compelled by the securities commission pursuant to its own investigation or which requires the commission to institute an investigation and have the information compelled, then an order by the commission is required for the release of such information.

QSC and OSC requests to SEC

The QSC and OSC can request information from the SEC without seeking judicial authorization. The possible request scenarios are as follows:

- to make a request or to exchange information when the SEC has the information and the information is either public or semi-public information;
- to make a request or to exchange information when the SEC has the information and the information has been either voluntarily supplied to the SEC or obtained by the SEC in the normal course;
- to make a request or to exchange information when the SEC had to compel the information in order to obtain it;¹
- to make a request or to exchange information when the SEC must institute an investigation in order to obtain such information.²

SEC requests to QSC and OSC

The SEC can request information from the QSC or the OSC without the latter two requiring judicial authorization in order to cooperate with the request. The possible request scenarios are as follows:

- to make a request or to exchange information when the QSC or OSC has the information and the information is either public or semi-public information;
- to make a request or to exchange information when the QSC or OSC has the information and the information has been either voluntarily supplied to the QSC or OSC or obtained by the QSC or OSC in the normal course;

¹ Although judicial authorization is never required to exchange information, the securities commission must authorize the exchange of information before it is, in fact, provided.

² *Supra*, footnote 1.

- to make a request or to exchange information when the QSC or OSC had to compel the information in order to obtain it;³
- to make a request or to exchange information when the QSC or OSC must institute an investigation in order to obtain such information.⁴

The income tax regime is similar to the securities law regime in that, the general rule is that judicial authorization is not required in order to be able to make a request for information or to be able to exchange the information gathered pursuant to a request. In Canada, judicial authorization is exceptionally required to exchange confidential information when, as noted under the subheadings "Canadian Tax Law Requests (via International Tax Directorate) to U.S. (Assistant Commissioner - International)" and "U.S. Request for Tax Information from Canada" hereinafter referred to, the state's internal tax rules require judicial authorization in order to obtain the information. However, unlike the securities law regime, the income tax exchange of information rules are more formally set forth in the internal guidelines prepared by the relevant authorities in both Canada and the U.S. which outline the different types of exchanges of information which can be made.

Information is exchanged by tax authorities spontaneously, automatically or pursuant to a request. Spontaneous exchanges involve information which is discovered pursuant to an investigation or audit which is thought to be of interest to the other authority. Automatic exchanges involve information which relates to dividends, interest, etc. made in one jurisdiction by a non-resident. Specific requests are requests for information which are deemed necessary for an audit or investigation. The information or the request must be transmitted from and to the "competent authority" in the jurisdiction. In Canada, the competent authority is the International Tax Directorate and in the U.S., the competent authority is the Assistant Commissioner (International).

³ Although judicial authorization is never required to exchange information, the securities commission must authorize the exchange of information before it is, in fact, provided.

⁴ *Supra*, footnote 1.

The following summarizes whether judicial authorization is required when requesting information or exchanging information in the area of income tax law.

Canadian Tax Law Request (via International Tax Directorate) to U.S. (Assistant Commissioner – International)

The International Tax Directorate, as the relevant Canadian authority, can request information from its American counterpart, the Assistant Commissioner (International) without needing to seek judicial authorization. The possible request scenarios are as follows:

- to make a request or to exchange information when the U.S. government has the information and the information has either been voluntarily supplied to the U.S. government or obtained by the U.S. government in the normal course;
- to make a request (provided reciprocity exists) or to exchange information when the U.S. government has the information which it obtained through an investigation;
- to make a request (unless judicial authorization would have been required under section 231.1 (search warrants), subsection 231.2(2) (unnamed persons) or subsection 231.1(2) (dwelling house)) or to exchange information when Canada requests the U.S. to collect the information.

Voluntary Supply by Canadian Tax Law Authority of Information to U.S. Tax Law Authority Without Specific Request

Canada can voluntarily supply tax information to the U.S. without receiving a specific request and without needing to seek judicial authorization. The types of information which could be involved in this situation are:

- to supply information which the Canadian government has obtained voluntarily or in the normal course;
- to supply information (except where documents or information are subject to an impounding order from the Court) which the Canadian government has obtained pursuant to an investigation;

U.S. requests for Tax Information from Canada

Canada can respond to American requests for tax information without seeking judicial authorization. The possible request scenarios are as follows:

- to make a request or to exchange information when the Canadian government has the information and the information has either been voluntarily supplied to the Canadian government or obtained by it in the normal course;
- to make a request or to exchange information (except where there is an impounding order from the Court) when the Canadian government has the information which it obtained through an investigation;
- to make a request or to exchange information (unless judicial authorization would have been required under section 231.1 (search warrants), subsection 231.2(2) (unnamed persons) or subsection 231.1(2) (dwelling house)) when Canada requests the U.S. to collect the information.

U.S. Responses to Canadian Requests for Tax Information

American tax authorities can respond to Canadian requests for information without seeking judicial authorization. The possible request scenarios are as follows:

- to supply information which the U.S. government has obtained voluntarily or in the normal course;
- to supply information which the U.S. government has obtained pursuant to an investigation;

In the area of securities and income tax laws, Canada and the U.S. appear to have developed practical working relations in terms of mutual assistance. In both areas, the focus of the government authorities involved is to exchange information in the most simple and efficient manner.

COMPARATIVE ANALYSIS OF LEGAL FRAMEWORKS PERTAINING TO EXCHANGE OF INFORMATION AND MUTUAL ASSISTANCE BETWEEN CANADA AND U.S. AUTHORITIES

1. INTRODUCTION

This report provides a comparative analysis of the mutual assistance and exchanges of information regimes in place between Canadian and U.S. enforcement authorities in the areas of securities and income tax law.

The report begins with a brief summary of the current provisions on confidentiality and exchanges of information under the *Competition Act*⁵. Exchanges of information in the criminal context pursuant to the Mutual Legal Assistance Treaty⁶ ("MLAT") between Canada and the U.S. are then outlined as such treaty applies with respect to, *inter alia*, competition, securities and income tax law.

For each of securities and income tax law regimes, the first section of the report with respect to each regime summarizes the definition and scope of "confidential information" as provided in the Canadian laws, the U.S. laws and the relevant treaties between Canada and the U.S. relating to the particular area of law. Following such section is a description of the approaches to the direction of the flow of information as provided in the relevant laws. This section reveals the types of requests for information which can be made and the authority to provide such information. Furthermore, when applicable, this section, distinguishes the types of requests based upon the categories of information involved; between voluntarily-provided information or compelled information. The report then details, for each regime, the actual practice that is followed between the relevant enforcement agencies when exchanging information and providing mutual assistance.

With respect to the securities and the income tax law regimes, the report also sets forth the safeguards in place to keep information confidential, if confidential information is being

⁵ Competition Act, R.S.C., 1985, c. C-34.

⁶ Canada Gazette, Pt. 1, 953 (1990).

exchanged. Finally, the report summarizes the penalties, if any, which are in place with respect to each regime where confidential information is not kept confidential.

This report was essentially prepared on the basis of a summary review of the applicable legislative framework and, where available, administrative guides, as well as telephone interviews with representatives of competent authorities. In the context of the mandate pursuant to which this report has been prepared, no specific case law review was carried out and no opinions were sought from legal counsel competent to practice in jurisdictions outside the Province of Quebec. Accordingly, this report does not purport to contain any legal opinions and it may not be relied upon for such purposes.

2. THE COMPETITION ACT

A. Confidential Information

Section 29 of the *Competition Act* prohibits Bureau staff from communicating:

- the identity of any person from whom information was obtained;
- information obtained pursuant to the exercise of formal powers, and
- information provided with respect to a pre-merger notification or a request for an advanced ruling certificate

except to

- a Canadian law enforcement agency, or
- for the purposes of the administration or enforcement of the *Competition Act*.

The Bureau's position⁷ is that it may communicate confidential information to a foreign law enforcement agency where the communication is necessary for the purposes of the administration or enforcement of the *Competition Act*. That is, where such disclosure would help the Bureau in receiving assistance or cooperation of that agency regarding a Canadian investigation. In order to encourage voluntary compliance with the *Competition Act*, it is the Bureau's policy to accord the same level of confidentiality to "non-section 29 information (i.e. information provided voluntarily)" as to "Section 29 information". However, both types of information are subject to disclosure to a foreign enforcement agency where such disclosure would advance the investigation of a Canadian case.

When the Bureau receives a request for information which is already on file with the Bureau, the information would be communicated to the foreign authority based upon the exception provided in Section 29 of the *Competition Act*. If the information requested is not on file with the Bureau and an investigation is required, the MLAT procedure would be followed to

⁷ Bulletin published by the Competition Bureau, Industry Canada - 1995-05-01, attached as Schedule A.

obtain and transmit the information. The MLAT applies however, only with respect to the communication of information in criminal matters.

The Bureau, in the course of an investigation, collects information from a variety of sources. The information collected relates to sales, profits, market shares, competition strategies and production costs, in order to adequately study and review the state of competition in an industry. Furthermore, where it deems appropriate, the Bureau will contact customers and suppliers. A lot of the information obtained by the Bureau in the course of an investigation is commercially sensitive. Although Section 29 of the Competition Act protects certain information, as discussed above, the current practice of the Bureau is to extend the Section 29 statutory protection to other information. As noted above, "communication of confidential information is not the rule, it is the exception."⁸ In addition to the exchange of information provided pursuant to the Competition Act, the Bureau can also exchange information based upon the MLAT, discussed below.

B. United States and Australia Agreement

(i) On April 27, 1999, the Government of the United States of America and the Government of Australia entered into an agreement on mutual antitrust enforcement assistance. The agreement provides that the parties intend to assist one another and to cooperate on a reciprocal basis in providing or obtaining antitrust evidence which may assist in determining violations of antitrust laws or in facilitating the administration or enforcement of such laws. The assistance to be provided includes, *inter alia*, disclosing, providing exchanging or discussing antitrust evidence. The agreement provides that the parties shall, to the fullest extent possible in accordance with their laws, maintain the confidentiality of any request and of any information communicated pursuant to the agreement. Each party also agrees to oppose any application by a third party for disclosure of such confidential information. The agreement provides the procedure to be followed when requesting and supplying information. In addition, judicial preauthorization is not required when requesting or supplying information. Furthermore, the

⁸ Page 1 of the Bulletin.

agreement sets forth the permitted uses of the information obtained as well as penalties should there be unauthorized or illegal disclosure of evidence.

(ii) The Schreiber case

In *Schreiber v. Canada* (Attorney General) [1998], S.C.R. 841, the Supreme Court had to determine whether the Canadian standard for the issuance of a search warrant was required to be satisfied before the Minister of Justice submitted a letter of request to Swiss authorities seeking their assistance with respect to a Canadian criminal investigation. The Federal Court, Trial Division, held that the Canadian standard for the issuance of a search warrant was required. The Federal Court of Appeal, in a majority judgment upheld that decision. The Supreme Court of Canada, however, in a majority judgment held that sending a letter of request to Swiss authorities is not prescribed by Section 8 of the Canadian Charter of Rights and Freedoms. Therefore, prior judicial authorization is not required when making a request as such action does not invade anyone's right to be secure against unreasonable search seizure. It was in Switzerland where such actions were undertaken. The Canadian government did not undertake a search and seizure but merely requested that one be undertaken.

C. Mutual Legal Assistance Treaty

The Treaty between the Government of Canada and the Government of the United States of America on MLAT stipulates that mutual legal assistance shall be provided with respect to the investigation, prosecution and suppression of offences. The MLAT creates a routine channel for obtaining a broad range of legal assistance in criminal matters and creates a contractual obligation between the treaty partners to provide assistance. MLATs allow the law authorities of one jurisdiction to communicate with a single central authority in another jurisdiction thereby eliminating the need to use time-consuming diplomatic channels and removing the need for judicial authorization. Furthermore, MLATs also facilitate the exchange of evidence in a form that will be admissible in the courts of the requesting state.

Generally, MLATs provide for, *inter alia*, the following types of assistance:

- (a) serving documents in the requested state;
- (b) locating or identifying persons or items in the requested state;

- (c) providing documents, records and articles of evidence located in the requested state;
- (d) executing requests for searches and seizures in the requested state; and
- (e) any other form of assistance not prohibited by the laws of the requested state.

The MLAT is implemented in Canada by the *Mutual Legal Assistance in Criminal Matters Act* ("MLACMA")⁹. The MLACMA provides, *inter alia*, the procedure for granting assistance under the MLAT.

For Canadian purposes, "Offence" means "an offence created by a law of Parliament that may be prosecuted upon indictment or an offence created by the legislature of a province specified in the Annex".¹⁰ The annex includes in the definition of offence, offences created by the provincial legislatures in the areas of securities, wildlife protection, environmental protection and consumer protection.

The MLAT enables both Canada and the U.S. to request that the other authority take measures under their existing laws to provide information which would otherwise be confidential, or to produce documents and search warrants. Assistance can be provided regardless of whether the conduct under investigation constitutes an offence in the requested state.

The MLAT allows either Canada or the United States to refuse to provide assistance if "the request is not made in conformity with the provisions of the Treaty, or execution of the request is contrary to its public interest, as determined by its Central Authority".¹¹

It is important to note that "public interest" is defined in the MLAT to mean "any substantial interest related to national security or other essential public policy".¹²

⁹ Chapter M-13.6 (R.S., 1985, c. 30 (4th supp.)).

¹⁰ Article I of the MLAT.

¹¹ Section 1 Article V of the MLAT. "Central Authority" is defined in Article I of the MLAT to mean, in Canada, the Minister of Justice and in the U.S., the U.S. Department of Justice.

¹² Article I of the MLAT.

(i) Confidential Information

The information exchanged pursuant to the MLAT is provided on a confidential basis. The state which requested the information or evidence cannot disclose the information or use the evidence for purposes other than those stated in the request.¹³ However, the requesting state may, with the prior written consent of the requested state, use such information or evidence for other agreed upon purposes. Once the information becomes public in accordance with proper procedure, it becomes a matter of public record in the requesting state. It may thereafter be used for any purpose.

(ii) Flow of Information - Request, Responses and Provision

In Canada, all requests pursuant to the MLAT must be channelled through the Minister of Justice. In the U.S., the central authority is the Commissioner, Office of International Affairs, Criminal Division, U.S. Department of Justice. The central authorities make requests under the MLAT on behalf of law enforcement and judicial authorities in their countries who are legally responsible for investigating and prosecuting criminal conduct. In the U.S., such authorities include federal and state prosecutors. In Canada, such authorities include crown prosecutors. Assistance is only available under the MLAT once an investigation or prosecution has been initiated by the requesting state. In the U.S., an investigation can be initiated by a prosecutor, a grand jury, an agency with criminal law enforcement responsibilities (such as the Internal Revenue Service) or an agency with regulatory responsibilities (such as the Securities and Exchange Commission). Similarly, in Canada, an investigation can be initiated by a crown prosecutor, an agency with criminal law enforcement responsibility or an agency with regulatory responsibilities. A request for information under the MLAT shall contain the information required by the requested state to execute the request, including:

- (a) the name of the competent authority conducting the investigation or the proceeding to which the request relates;
- (b) the subject matter and nature of the investigation or proceedings to which the request relates;
- (c) a description of the evidence, information or assistance sought;

¹³ Section 2 of Article IX of the MLAT.

- (d) the purpose for which the evidence, information or other assistance is sought and any time limitations relevant thereto; and
- (e) requirements for confidentiality.¹⁴

The MLAT provides that all requests shall be promptly executed. Furthermore, the courts of a requested state shall have jurisdiction to issue subpoenas, search warrants and any other order necessary to properly and efficiently execute the request.¹⁵ Although the MLAT provides that all requests shall be in writing, in urgent situations, the request can be made verbally and confirmed in writing thereafter.¹⁶

It is important to note that the assistance and exchanges of information which can be provided pursuant to the MLAT are limited to the investigation, prosecution and suppression of offences. Furthermore, as mentioned above, "offence" is itself limited in Canada to indictable offences as well as certain provincial offences and in the U.S., to felonies.

¹⁴ Section 3 of Article VI of the MLAT.

¹⁵ Section 1 of Article VII of the MLAT.

¹⁶ Section 2 of Article VI of the MLAT.

3. SECURITIES LAW REGIME

A. Introduction

Securities regulation in Canada is primarily dealt with under provincial law. The securities acts of the provinces are enacted under the provinces' powers to legislate with respect to "property and civil rights".¹⁷ This being the case, there are many instances where securities activities extend beyond provincial boundaries. As a result, there has been an increased growth of interprovincial cooperation in order to avoid inconsistent requirements which would impede efficient functioning of the securities markets. For the purpose of exposing the "Canadian" securities law regime, this report will focus on the securities rules of Ontario and Quebec insofar as they relate to matters of confidentiality. The rules and procedures followed in Ontario are fairly representative of the rules and procedures followed in the remaining common law provinces.

In the United States, securities regulation is dealt with primarily at the federal level and therefore the U.S. federal provisions will be the focus of this report. Both the *Securities Act of 1933* and the *Securities Exchange Act of 1934* (the "U.S. Securities Act") regulate securities at the federal level. This report will concentrate on the latter act since the issues surrounding confidential information are addressed therein.

B. Confidential Information

(i) Quebec and Ontario

One of the key components of securities laws in Canada, Ontario and Quebec being no exception, is the notion of continuous disclosure. One of the purposes of continuous disclosure is to make all material facts available to an investor so that he can make an informed investment decision. The obligation of continuous disclosure is only imposed upon issuers who are defined as "reporting issuers" under the various securities acts. Reporting issuers are required to disclose information as their securities are traded in markets in which potential investors are deemed to require the information disclosed via continuous disclosure. Therefore, once a person

¹⁷ Section 92(13) of the *Constitution Act*, 1982, enacted as Schedule B to the *Canada Act 1982 (UK)*, 1982, c.11.

or a company decides to distribute its securities within the definitions of the securities acts, it becomes subject to the rules provided therein. Furthermore, should the person or company become a "reporting issuer", it shall be subject to the rules relating to continuous disclosure.

All the information disclosed by an issuer pursuant to the continuous disclosure rules is open to the public and is therefore not confidential. However, in some instances, material information can be reported on a "confidential" basis. For example, Section 75(3) of the *Securities Act* (Ontario)¹⁸ (the "Ontario Securities Act") provides as follows:

"(3) *Idem.* - Where,

(a) in the opinion of the reporting issuer, the *disclosure* required by subsections(1) and (2) would be unduly detrimental to the interests of the reporting issuer; or

(b) the material change consists of a decision to implement a change made by senior management of the issuer who believe that confirmation of the decision by the board of directors is probable and senior management of the issuer has no reason to believe that persons with knowledge of the material change have made use of such knowledge in purchasing or selling securities of the issuer,

the reporting issuer may, in lieu of compliance with subsection (1) forthwith file with the Commission the report required under subsection (2) marked so as to indicate that it is confidential, together with written reasons for non-disclosure.

(4) *Idem.* - Where a report has been filed with the Commission under subsection (3), the reporting issuer shall advise the Commission in writing where it believes the report should continue to remain confidential within ten days of the date of filing of the initial report and every ten days thereafter until the material change is generally disclosed in the manner referred to in subsection (1) or, if the material change consists of a decision of the type referred to in clause (3)(b), until that decision has been rejected by the board of directors of the issuer."

Therefore, although the general rule requires that all material facts be disclosed, a reporting issuer can file the information with the Ontario Securities Commission (the "OSC") on a confidential basis if the requirements provided in Section 75 above are met. The *Securities Act*

¹⁸ R.S.O. 1990, C.S.S., as amended.

(Quebec)¹⁹ (the "Quebec Securities Act") provides similar rules such that reports which must be filed can be filed on a confidential basis. When information is disclosed to the Quebec Securities Commission (the "QSC") on a confidential basis, such information cannot be disclosed by the QSC to any person.

Aside from the reports which are filed which are considered confidential, when the securities commissions conduct investigations, the information obtained pursuant to such investigations is deemed confidential. In Quebec, this is by virtue of Section 244 of the Quebec Securities Act which provides that investigations are held *in camera*. In Ontario, this is by virtue of Section 16 of the Ontario Securities Act which provides that any report, testimony, documents, etc., obtained pursuant to an investigation are deemed confidential.

Therefore, a company which is a reporting issuer is obliged to continuously disclose certain information about itself. This information is public and includes, among other things, financial information and all material changes in the affairs of the reporting issuer. Certain material changes can be filed confidentially and the information obtained by the commissions pursuant to an investigation constitutes confidential information. Finally, although not specifically stated in the Quebec Securities Act or the Ontario Securities Act, the QSC and the OSC do not consider voluntarily-provided information as confidential information. Voluntarily-provided information can be exchanged without any formalities.²⁰

(ii) U.S.

The securities laws²¹ in the United States are similar to those in Quebec and Ontario in that public companies are subject to certain disclosure-of-information rules. The information obtained via continuous disclosure is public information. The Securities and Exchange Commission (the "SEC") is, like the OSC and the QSC, also authorized to make such investigations as it deems necessary to determine whether a person has violated securities laws

¹⁹ R.S.Q., c. V-1.1.

²⁰ *Infra*, page 25 "In Practice".

²¹ In the United States, there are several laws which govern securities matters. For this report, as stated above, the relevant act is the *Securities Exchange Act* 1934.

and other related laws.²² Furthermore, the SEC may provide assistance on a request from a foreign authority. As in Quebec and Ontario, pursuant to Rule 0-4 of the *General Rules and Regulations promulgated under the Securities Exchange Act 1934* (the "U.S. Regulations"), all information and documents obtained by the SEC in the course of an investigation, unless a matter of public record, are deemed confidential. All employees and officers are bound to keep all information confidential unless the SEC authorizes its disclosure as not being contrary to the public interest.

Furthermore, even though a reporting issuer is subject to continuous disclosure requirements, Rule 0-6 of the U.S. Regulations provides that certain information may be protected (i.e. subject to confidentiality) if it is deemed to be in the interest of national defense or foreign policy. As in Quebec and Ontario, a company, when filing information required to be disclosed pursuant to the continuous disclosure rules, can request that such information be kept confidential.

The SEC, like the QSC and OSC holds many public documents relating to the companies subject to the disclosure requirements provided in the U.S. Securities Act. The SEC as well as the QSC and the OSC also hold information and records which are considered to be non-public, in that they are not available for public inspection or copying. The non-public documents may only be disclosed to certain persons and under certain circumstances which will be discussed below.

(iii) Memorandum of Understanding

On January 7, 1988, the SEC and the OSC, the QSC and the British Columbia Securities Commission ("BCSC") entered into a memorandum of understanding (the "MOU")²³ relating to requests for assistance in connection with the administration and enforcement of United States and Canadian securities laws.

²² Section 21, *U.S. Securities Act*.

²³ OSC Bulletin, Vol. II, no. 2, January 15, 1988. A copy of the MOU is attached hereto as Schedule A.

The MOU states that the authorities²⁴ will provide the fullest mutual assistance "to facilitate the performance of securities market oversight functions and the conduct of investigations, litigation or prosecution in cases where information within the jurisdiction of the requested authority is needed to determine whether, or prove that, the laws or regulations of the requesting authority may have been violated."²⁵ The purpose of the MOU is to establish and confirm the importance of mutual assistance. The MOU does not comprehensively set forth all the procedures to follow when exchanging information. Information is also exchanged informally without reference to any act or agreement. In fact, Section 1 of Article 3 of the MOU provides that the execution of the MOU does not prohibit the parties from attempting to obtain information, evidence or documents located in the jurisdiction of another party by measures other than those provided in the MOU. The assistance to be provided pursuant to the MOU includes providing access to information in the files of the requested authority, taking evidence of persons and obtaining documents from third persons.²⁶

(iv) Confidential Information

Section 1 of Article 7 of the MOU provides that the parties will keep confidential the contents of any request made pursuant to the MOU, the information gathered thereunder, as well as any other matters in relation thereto, to the extent permitted by law except for disclosures which are "absolutely necessary" to carry out the request. The section continues by stating that such confidentiality may be waived by mutual agreement between the parties. The parties to the MOU further undertake not to offer the information to a third party and to use its best efforts to make sure that the information is not obtained by any third party.²⁷

²⁴ According to the definitions provided in the MOU: "Authorities" means the SEC, the OSC, the QSC and the BCSC.

²⁵ Section 1 of Article 2 of the MOU.

²⁶ Section 2 of Article 2 of the MOU.

²⁷ Section 3 of Article 7 of the MOU. Furthermore, the MOU provides that, if a third party obtains the information, the requesting authority will use its best efforts to ensure that such information will not be disclosed by the third party to another person.

(v) Permissible use of information

The MOU provides the purposes for which the information obtained can be used. Firstly, the information can be used for the purposes stated in the request with respect to ensuring compliance with or enforcement of the securities laws or regulations. Secondly, the information can be used for purposes within the general framework of the use stated in the request. This latter point includes conducting civil or administrative enforcement proceedings, assisting in self-regulatory enforcement proceedings or conducting any investigation relating thereto.²⁸ In fact, the confidentiality provisions in the MOU provide an exception to the disclosure of information to third parties if its disclosure falls within the permitted uses provided above. Therefore, the information will not remain confidential if it is required for a civil or administrative enforcement proceeding or with respect to a criminal prosecution.

C. Flow of Information – Requests, Responses and Provision

(i) Quebec and Ontario

In Quebec all investigations made under Section 239 of the Quebec Securities Act are held *in camera*. Furthermore, according to Section 245 of the said Act the QSC may forbid a person from disclosing any information relating to an investigation. The rule is confidentiality and it is only with the QSC's authorization that investigation reports can be disclosed.²⁹ In Ontario, the OSC can only disclose confidential information to persons pursuant to a Section 17 order. Section 17 of the Ontario Securities Act grants the OSC the authority to decide whether or not it shall disclose confidential information. According to such section, the OSC may order the disclosure of confidential information if it is in the public interest to do so.³⁰

Both the Ontario Securities Act and the Quebec Securities Act provide that the securities commission to which it relates may order an investigation in order to aid it in the due administration of its own act or the securities legislation of another legislative authority. More detailed than the Quebec Securities Act, the Ontario Securities Act provides at Section 11 that

²⁸ Section 1 of Article 6 of the MOU.

²⁹ Section 297 of the Quebec Securities Act.

³⁰ Public interest is not defined in the Ontario Securities Act. A representative of the OSC advised that it is decided on a case by case basis whether disclosure would be in the public interest.

the investigation may involve the affairs of the person or company including, *inter alia*, any trades, negotiations, transactions, loans, or payments to, by, on behalf of or connected with the person or the company as well as the assets, liabilities, debts or obligations existing at any time.

The Ontario Securities Act provides that the information obtained pursuant to an investigation, including the content of the order of the OSC describing the investigation as well as the testimony of any witnesses, shall not be disclosed by any person or company.³¹ As noted above, Section 17 of the Ontario Securities Act provides that the information may be disclosed if the OSC considers that it would be in the public interest to do so. The OSC, when deciding whether it is in the public interest to disclose certain information, must have given the interested parties notice of the potential disclosure and an opportunity to be heard with respect thereto.³² According to Section 245 of the Quebec Securities Act, the QSC may forbid a person to disclose information relating to an investigation to anyone but his counsel. Furthermore, the QSC may declare a document inaccessible if it could result in serious prejudice.³³ Finally, as noted above, investigation reports and inspection reports can only be obtained with the QSC's authorization.³⁴

Therefore, in Ontario information that is confidential can be disclosed pursuant to an order if the OSC considers that it is in the public interest to do so. The order states to whom the information shall be disclosed and shall, if deemed advisable, subject the disclosure to certain terms and conditions.³⁵ In Quebec, all investigations are held *in camera* and as such are private, and the information obtained pursuant thereto can only be inspected with the QSC's authority.

Both the Quebec Securities Act and the Ontario Securities Act provide that an investigation can be instituted in order to aid in the administration of the securities legislation of another legislative authority. Therefore, upon receipt of a request for information from another

³¹ Section 15 of the Ontario Securities Act. The information, however, may be disclosed to the person's or company's counsel.

³² Section 17 of the Ontario Securities Act.

³³ Section 296 of the Quebec Securities Act.

³⁴ Section 297 of the Quebec Securities Act.

³⁵ Section 17 of the Ontario Securities Act.

legislative authority,³⁶ each securities commission will decide whether it will investigate the matter. Once it has decided to do so and has proceeded with the investigation, the information may be disclosed to the foreign authority which has requested such information. In Ontario this requires a disclosure order pursuant to Section 17 of the Ontario Securities Act and in Quebec this requires a disclosure order pursuant to Section 297 of the Quebec Securities Act. In both jurisdictions the information obtained pursuant to an investigation is deemed confidential and it is the securities commission which decides whether such information shall, in fact, be disclosed, regardless of whether the disclosure is to a foreign authority. Information which is public i.e., all the information disclosed by a company pursuant to the rules on continuous disclosure, can be provided to anyone.

It is important to note that the QSC and the OSC are granted the power to conduct investigations, hearings, call witness, etc. The QSC and the OSC exercise similar powers to that of a court when conducting investigations. Should a person fail to comply with an order to produce documents, the QSC and the OSC can proceed to court to obtain a contempt citation against such person. In practice, we have been advised that the mere threat of proceeding to court has been sufficient to cause the person to act in accordance with the securities commission's request.

The QSC and the OSC also collect other information with respect to companies, some of which is public and some of which is "semi-public".³⁷ Although not specifically provided for in the Quebec Securities Act or the Ontario Securities Act, the QSC and the OSC will have on record other information relating to companies such as articles written about a company (which are public), registration status (which is semi-public) as well as other information collected which is not necessarily public. This "semi-public" information is apparently exchanged with the commissions in other jurisdictions on an informal basis.³⁸

³⁶ Neither the Quebec Securities Act nor the Ontario Securities Act provides rules regulating the form of requests which must be made when the requesting state requires public information or information which requires an investigation. This is provided in the MOU.

³⁷ "Semi-public information" is a term used by the OSC to mean information to which the public can have access for a fee.

³⁸ *Infra*, page 25, "In practice".

The methods of exchanging information is set forth in the MOU when it relates to specific requests for information. However, the securities commissions have developed informal arrangements to disclose and exchange other public or semi-public information.

(ii) U.S.

The U.S. Securities Act is more detailed than both the Quebec Securities Act and the Ontario Securities Act in terms of setting forth conditions for the disclosure of confidential information. Records relating to companies held by the SEC which are deemed to be non-public may be disclosed in accordance with Rule 24c-1 of the U.S. Regulations. According to such Rule, the SEC may in its discretion disclose such information if the person receiving the information provides assurances that such information will be kept confidential. The U.S. Regulations limit the disclosure to, among others, the government (federal, state, local or foreign) or any agency thereof, a trustee in bankruptcy, a self-regulatory organization, a foreign financial regulatory authority, a bar or professional association and any member thereof. The SEC always has the discretion to refuse to disclose the information notwithstanding the need for such information established by the requesting party.³⁹

Further, as stated above, although Rule 0-4 of the U.S. Regulations provides that all information or documents obtained by officers or employees of the SEC pursuant to an investigation are deemed confidential, the SEC might authorize their disclosure as not being contrary to public interest.

The SEC is also authorized to disclose confidential records⁴⁰ to such persons, foreign or domestic, as the SEC deems appropriate, as long as the person receiving the information provides assurances that the information shall remain confidential.

Section 21 of the U.S. Securities Act provides that a foreign authority can request assistance from the SEC commission to obtain information on a person who is suspected of violating the laws of the foreign authority. The request is made in writing to the SEC. When

³⁹ Subsection C of Rule 24c-1 of the Regulations.

⁴⁰ Records includes all applications, statements, reports, contracts, correspondence, notices and other documents filed with or otherwise obtained by the commission. Section 24 of the U.S. *Securities Act*.

received, the SEC decides whether it will conduct an investigation to collect the requested information. In deciding whether to provide assistance, the SEC considers whether the requesting authority has agreed to provide reciprocal assistance in securities matters to the SEC and whether compliance with the request would prejudice the public interest of the United States.⁴¹

Once the SEC has decided that it will provide the required assistance, every member of the SEC, in proceeding with an investigation, is granted the authority to administer oaths, subpoena witnesses, compel their attendance or require the production of records which may be deemed relevant to the inquiry. Once the information is obtained, it can then be transmitted to the requesting authority.

Therefore, as in Quebec and Ontario, information obtained by the SEC pursuant to the continuous disclosure provisions can be provided to anyone as such information constitute public records. Other information obtained pursuant to an investigation which is deemed confidential can be exchanged with foreign or domestic authorities if the SEC is assured that such information will remain confidential. Furthermore, the U.S. *Securities Act* provides, like the Ontario Securities Act and the Quebec Securities Act, that the SEC can assist a foreign authority in obtaining information. Certain formalities must be followed and it is the SEC which decides whether or not assistance will be provided. Once assistance is provided, the SEC decides whether the information can be disclosed to the requesting jurisdiction.

(iii) MOU

All requests for assistance pursuant to the MOU must be made in writing.⁴² The request shall provide a general description of the information, documents or testimony sought, the purpose for which the information is being requested, the persons believed to possess the information, the place where the information can be obtained, the legal provisions relating to the

⁴¹ Subsection 21(a)(2) of the U.S. Securities Act.

⁴² Section 1 of Article 4 of the MOU.

matter requested and the delay for responding.⁴³ The authority of a securities commission or a court is not required when making a request.

Notwithstanding the foregoing, Subsection 2(a) of Article 2 of the MOU provides that requests for information which is available from any public source may be made on an informal basis without reliance on a written agreement.⁴⁴ In fact, such is the practice of the SEC, the QSC and the OSC in exchanging public information.

The MOU also provides that the parties shall use reasonable efforts to exchange information it has come across which it believes to be of interest to the other party in terms of a breach or anticipated breach of the other parties' laws. This provision of the MOU (Section 1 of Article 9) in respect of unsolicited assistance confirms the intention of the parties to cooperate with one another. The requested authority can deny assistance on grounds of public interest.⁴⁵

Upon receipt of a written request, the requested securities commission will decide whether or not the assistance requested will be provided. If the requested securities commission decides that it will proceed with an investigation, the rules relating to investigations provided in its securities act apply. These rules, as noted above, grant each of the securities commissions with the powers of a court to hold hearings. Once the investigation is complete and the information is obtained, the requested securities commission will decide whether or not the information can be transmitted to the requesting authority. It is possible that once the information is obtained it is decided that it should not be transmitted on grounds of public interest.

(iv) In Practice

The spirit of the MOU is one of exchange, cooperation and mutual assistance to the greatest degree which is practical. One of the most important aspects of the MOU is to confirm

⁴³ Section 2 of Article 4 of the MOU.

⁴⁴ *Infra*, page 25, "In Practice".

⁴⁵ Section 4 of Article 3 of the MOU. Public interest is not defined in the MOU. We have been informed by a representative of the OSC that there is no official criteria used to determine whether something is in the public interest. Such determination is made on a case by case basis. For example, if an investigation has been instituted by the requested authority, it might decide that it is not appropriate to provide assistance.

the notion of exchange and mutual assistance. It was not drafted to provide all of the procedures necessary when exchanging information but rather to confirm the intention of the parties. As a result, we have been advised that all the securities commissions which are party to the MOU work to be as helpful as possible in the exchange of information.

There is apparently no special group or division within the securities commissions which deals with exchanges of information. When an employee or staff member of a securities commission comes across information during the course of his work which leads him to believe an investigation or information is required, he either calls his counterpart at the requested securities commission or drafts a written request which is transmitted, apparently without further formality, to such securities commission. The authorization of the securities commissions is required when making a request, whether verbal or written, for information. It should be noted that a commission can institute its own investigation based upon information found pursuant to a request by a foreign authority. The securities commissions often use photocopied documents so that it is not a problem to exchange information with a foreign authority and retain the use of the original document for its own investigation.

In the United States, as reported above, the SEC is granted broad authority to investigate possible violations of U.S. securities laws as well as foreign securities laws. When an investigation is informal, the staff conduct the investigation without the authorization of the SEC. That is, staff can request information on a voluntary basis. If a formal investigation is required, the staff can use the subpoena powers granted to the SEC to compel witnesses to testify or to produce books, records or any other evidence.

There are apparently several types of information which can be requested and exchanges which can be made:

1. The foreign authority can request information which is public or semi-public. This is information which is on file with the securities commission and can include articles written about a particular public company. The request is made informally i.e., usually verbally, and the information is provided without further formality.

2. The foreign authority can request information which is on record with the securities commission. This is information which the securities commission collects in the normal course such as the registration status of a registrant, addresses, etc. This information is not public in that it has not been disclosed pursuant to the continuous disclosure provisions of the applicable securities act. The request for this type of information is provided without further formality.
3. The foreign authority can request information from an ongoing investigation file. That is, the foreign authority is aware that an investigation of a particular company is ongoing and would like information relating thereto. In this case, there are two possible scenarios. The first possibility is that the information requested is information which has been voluntarily-provided to the securities commission in the course of its investigation. This voluntarily-provided information is exchanged without further formality.⁴⁶ The second possibility is that the information requested is information which has not been voluntarily-provided during the course of the investigation but information which the securities commission had to compel. In this case, in order to provide such information, the securities commission must grant an order to disclose such information to the foreign authority. That is, this constitutes confidential information which can only be exchanged by order of the commission i.e., a Section 17 order in Ontario.
4. The fourth and final scenario is the case where the foreign authority is requesting that the securities commission obtain information which it does not possess, and therefore requires the securities commission to proceed with an investigation to obtain such information. The request in this case must be made in writing and follows the format set forth in the MOU.⁴⁷ Upon receipt, the securities commission will proceed with an investigation in accordance with the provisions

⁴⁶ Representatives of the commissions have advised that the fact that voluntarily-provided information is exchanged without any formalities has no impact on whether persons voluntarily provide information. Certain persons are willing to provide information voluntarily while others are not.

⁴⁷ The MOU does provide that in urgent situations the request need not be in writing.

of its act. Therefore, in Quebec the investigation is made pursuant to Section 239 of the Quebec Securities Act and in Ontario, with respect to Section 11 of the Ontario Securities Act. Once the investigation is complete and the information is obtained, the commission will decide whether such information shall be in fact provided to the foreign authority.⁴⁸

As noted above, when information is exchanged which is deemed confidential it is possible that conditions be imposed on its use. For example, Section 17 of the Ontario Securities Act provides that the OSC may subject the transmission to certain terms and conditions. Thus the information might be exchanged for a specific purpose only.

Finally, with respect to the MLAT, as discussed above, although the MLAT specifically provides that it applies for assistance in connection with securities matters, it is not often used in this regard. The MLAT is limited to criminal securities matters, which do not arise as often as regulatory matters. Therefore, even though the MLAT can be used to obtain information and get assistance, the assistance and information exchanged is usually obtained pursuant to the MOU and the powers granted pursuant to the securities acts themselves. Of course, should the MLAT be used, the procedure for obtaining assistance is the same as provided above.

As stated above, the spirit of the MOU is assistance and cooperation. Therefore, even if the information requested is in the hands of another governmental organization; that is, not the securities commission, the requested securities commission will apparently use its best efforts to obtain such information for the requesting commission.⁴⁹

⁴⁸ In Ontario, an order pursuant to Section 17 of the Ontario Securities Act would be required.

⁴⁹ We have been advised that the OSC deals with "a number of requests for assistance on a monthly basis". An exact number was not disclosed. Furthermore, the commissions would not advise as to the number of refusals given in response to request for information.

There is no need, however for a representative of a commission to obtain the authorization of the securities commission or a judge in order to make a request for information. The authorization of the securities commission is needed to institute an investigation and to determine whether the non-public information obtained pursuant to the investigation is, in fact, to be disclosed.

QSC and OSC requests to SEC

The QSC and OSC can request information from the SEC without seeking judicial authorization. The possible request scenarios are as follows:

- to make a request or to exchange information when the SEC has the information and the information is either public or semi-public information;
- to make a request or to exchange information when the SEC has the information and the information has been either voluntarily supplied to the SEC or obtained by the SEC in the normal course;
- to make a request or to exchange information when the SEC had to compel the information in order to obtain it;⁵⁰
- to make a request or to exchange information when the SEC must institute an investigation in order to obtain such information.⁵¹

SEC requests to QSC and OSC

The SEC can request information from the QSC or the OSC without the latter two requiring judicial authorization in order to cooperate with the request. The possible request scenarios are as follows:

⁵⁰ Although judicial authorization is never required to exchange information, the securities commission must authorize the exchange of information before it is, in fact, provided.

⁵¹ *Supra*, footnote 1.

- to make a request or to exchange information when the QSC or OSC has the information and the information is either public or semi-public information;
- to make a request or to exchange information when the QSC or OSC has the information and the information has been either voluntarily supplied to the QSC or OSC or obtained by the QSC or OSC in the normal course;
- to make a request or to exchange information when the QSC or OSC had to compel the information in order to obtain it;⁵²
- to make a request or to exchange information when the QSC or OSC must institute an investigation in order to obtain such information.⁵³

D. Penalties

(i) Quebec and Ontario

The penalties for disclosing confidential information by a member of the securities commission are provided for in the internal rules of the securities commission and consist of disciplinary action. Should a foreign authority disclose confidential information provided to it on a confidential basis by a securities commission, the securities commissions have no authority to penalize the foreign authority, either under their internal rules or under their securities acts. Refusing to provide assistance in the future to such foreign authority is the only "penalty" that can be imposed.

In Ontario, Section 141 of the Ontario Securities Act provides that no action or other proceeding for damages may be instituted against the Ontario Securities Commission or any member thereof for any act done in good faith.

Furthermore, according to Section 17(3) of the Ontario Securities Act, testimonial evidence cannot be transmitted to the police or to any person responsible for the enforcement of

⁵² Although judicial authorization is never required to exchange information, the securities commission must authorize the exchange of information before it is, in fact, provided.

⁵³ *Supra*, footnote 1.

criminal law in Canada without the written consent of the person from whom the testimony was obtained. This does not apply to information obtained from a foreign authority pursuant to a request. Although there is no prohibition against releasing such testimony, it is unlikely that the Ontario Securities Commission would do so as it would impact the maintenance of ongoing relationships with the foreign jurisdiction. Therefore, information obtained pursuant to an investigation will be used solely for civil purposes.

(ii) U.S.

The U.S. *Securities Act* provides, at Section 21, civil penalties which can be imposed on the SEC if it should obtain financial records or information contained therein in violation of the rules for obtaining such information.⁵⁴ Furthermore, as in Quebec and Ontario, if personnel of the SEC disclose confidential information, disciplinary proceedings could be instituted.

As mentioned above, since authorities in the U.S., like Canada, cannot impose penalties on a foreign authority, refusing to assist a foreign authority who violates confidentiality is the only "penalty" which can be imposed.

(iii) MOU

The MOU includes an article which deals with disputes.⁵⁵ Although it does not specifically refer to breaches of confidentiality, it could conceivably still apply. Furthermore, should a party note that another party is consistently breaching the confidentiality rules provided in the MOU, the MOU could be terminated.⁵⁶

⁵⁴ Section 21 of the U.S. Securities Act provides that financial records can only be obtained via subpoena issued by a U.S. district court following an *ex parte* hearing.

⁵⁵ Article 8 of the MOU.

⁵⁶ Article 13 of the MOU.

E. Safeguards

(i) Quebec and Ontario

The Quebec Securities Act provides that the QSC may forbid a person from disclosing information relating to an investigation.⁵⁷ Similarly, in Ontario, information which is confidential (generally, information obtained pursuant to an investigation) can be disclosed by order of the OSC⁵⁸ and the Ontario Securities Act further provides that the OSC can impose terms and conditions on its disclosure. That is, it can specify that the information can only be used for a specific purpose. Aside from the above, the Quebec Securities Act and the Ontario Securities Act do not provide any other safeguards to ensure the proper use of confidential information.

(ii) U.S.

According to the U.S. *Securities Act*, all non-public information and information obtained pursuant to an investigation is confidential. However, such information can be exchanged if the person receiving the information provides adequate assurances to the SEC that the confidentiality of such information will be maintained. In fact, the SEC apparently will not authorize the disclosure of any confidential information if it is not adequately assured that the confidentiality of such information will be maintained.

(iii) MOU

The MOU provides that all information exchanged pursuant thereto, shall be done so on a confidential basis. Further, the MOU limits the use of information exchanged to the specific purposes discussed above.

(iv) In Practice

In practical terms, it may not be easy to control a foreign authority's use of information. Even though a commission has put terms and conditions on the use of information it is still possible that such information will be used by a foreign authority in a manner which is contrary

⁵⁷ Section 239 of the Quebec Securities Act.

⁵⁸ Section 17 of the Ontario Securities Act.

to such terms and conditions. Clearly the most compelling safeguard is that each of the securities commissions recognize the need for continued assistance and exchange of information and would not likely be willing to jeopardize obtaining future assistance or information by disclosing or misusing confidential information disclosed to them.

4. TAX LAW REGIME

A. Introduction

This section provides a review of the rules applicable to mutual assistance and exchange of information between the United States and Canada in the area of tax. The Canadian rules are found in the *Income Tax Act*⁵⁹ ("ITA"), the regulations and the Canada-United States Tax Convention⁶⁰ (the "Canada-U.S. Convention"). The U.S. rules are found in the *Internal Revenue Code* (the "IRC"), the regulations and the Canada-U.S. Convention.

B. Confidential Information

(i) Canadian Law

The principal limitation on the ability to use domestic investigatory powers in an international context is the confidentiality provisions contained at section 241 ITA, which expressly forbid the disclosure of taxpayer information obtained by Revenue Canada other than in certain defined circumstances. It follows that in the absence of specific authority, Revenue Canada may not disclose any information to a foreign government. Under the ITA, confidentiality must be preserved with respect to all "taxpayer information". Subsection 241(10) of the ITA defines "taxpayer information" as "information of any kind and in any form relating to one or more taxpayers that is (a) obtained by or on behalf of the Minister for the purposes of the ITA, or (b) prepared from information referred to in paragraph (a), but does not include information that does not directly or indirectly reveal the identity of the taxpayer to whom it relates". Documents and information obtained by Revenue Canada from taxpayers on a voluntary basis with Revenue Canada's undertaking to maintain confidentiality cannot be used for a different purpose than the one for which they were obtained. In *Crestbrook Forest Industries Ltd. v. R.*⁶¹, Revenue Canada obtained documents and information in the course of

⁵⁹ R.S.C. 1985, c.1 (5th Supp.), as amended (including current pending amendments).

⁶⁰ *Convention between Canada and the United States of America with respect to taxes on income and capital signed on September 26, 1980, as amended by the protocols signed on June 14, 1983, March 28, 1984, March 17, 1995, and July 29, 1997, enacted in Canada by S.C. 1984 c. 20 as amended by S.C. 1995, c. 34, S.C. 1997, c. 38, attached hereto as Schedule C.*

⁶¹ *Crestbrook Forest Industries Ltd.*, 92 DTC 6187 (FCA).

conducting a survey of the wood pulp and newsprint industry. The purpose of the survey was to determine a reasonable range of arm's length sales discounts and commissions applicable to wood pulp and newsprint export prices. The survey was intended to provide a basis for bilateral discussions between Revenue Canada and the U.S. Internal Revenue Service in the development of rules applicable to companies involved in that industry. The survey report disclosed the confidential nature of the information and that it was obtained on the undertaking that confidentiality would be preserved. The Federal Court of Appeal ruled that where the Crown has obtained information in confidence from taxpayers on a voluntary basis and for a specific purpose, it may not subsequently make use of that information for a different purpose.

(ii) U.S.

Under the IRC, "returns" and "return information" are confidential and shall only be disclosed as authorized by the IRC. The definitions of return and return information are set forth in Section 6103 of the IRC:

"The term 'return' means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

The term 'return information' means—

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offence, and

← (B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110, but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a

particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

- The term 'taxpayer return information' means return information as defined in paragraph (2) which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates."

(iii) Canada-U.S. Convention

(a) Introduction

The rules pertaining to the exchange of information under the Canada-U.S. Convention are provided at Article XXVII of the Canada-U.S. Convention. Generally speaking, information may be exchanged under the Canada-U.S. Convention with respect to most Canadian taxes.

(b) The purposes for which the information shall be exchanged

The Canada-U.S. Convention allows the competent authorities in each contracting state to exchange information for specific purposes.⁶² Canada and United States shall exchange the information necessary for carrying out both the provisions of the Canada-U.S. Convention and the domestic laws of either state insofar as the taxation thereunder is not contrary to the convention.

(c) Confidential information

Article XXVII of the Canada-U.S. Convention provides that:

"any information received by a Contracting State shall be treated as **secret** in the same manner as information obtained under the taxation laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the administration and enforcement in respect of, or the determination of appeals in relation to the taxes to which the Canada-U.S. Convention applies or, notwithstanding paragraph 4, in relation to

⁶² In Canada, the competent authority is the Minister of National Revenue or his authorized representative and in the US, the Secretary of the Treasury or his delegate (subparagraph 1(g) of Article III of the Convention). The competent authority is in fact composed of senior officials of both revenue authorities.

taxes imposed by a political subdivision or local authority of a Contracting State that are substantially similar to the taxes covered by the Canada-U.S. Convention under Article II (taxes covered). Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or judicial decisions. The competent authorities may release to an arbitration board established pursuant to paragraph 6 of Article XXVI such information as is necessary for carrying out the arbitration procedure; the members of the arbitration board shall be subject to limitations on disclosure described in this Article."

A requested State enjoys the discretion to refuse to supply information which would disclose any trade, business, industrial, commercial or professional secret, trade process or any information which would be contrary to public policy.⁶³

If trade, business and commercial secrets are interpreted too broadly, then the exchange of information provisions could be almost entirely negated. Paragraph 19 of the Commentary to Article 26 of the 1992 OECD Model Convention suggests that such secrets "should not be taken in too wide a sense".

Highly sensitive information should not be easily disclosed. As a rule of thumb, if the disclosure of the information would be highly prejudicial to one's business, there is a *prima facie* case for non-disclosure. A list of recipients of secret commissions has been held to be a business secret deserving protection because its disclosure would disrupt the taxpayer's business⁶⁴.

There are foreign cases where the courts have lifted bank secrecy in order to allow information to be provided to a treaty partner.⁶⁵

Finally, disclosure may be refused if it results in a violation of professional confidentiality. Since the solicitor-client privilege is expressly protected domestically⁶⁶, it should enjoy similar protection in a treaty context.

⁶³ Subparagraph 2c) of Article 26 to the 1992 OECD Model Convention.

⁶⁴ See: Belgium/Italy Sept 5, 1980 Brussels Court of Attachment (European Taxation March 1987 at p. 87) (EK at 8.2003).

⁶⁵ Germany/Sweden February 20, 1979 BFH (Bundesfinanzhof; VII 16/78) (EK at 10.5001); Switzerland/US December 23, 1970 Bundesgericht (96-I BGE 737) (*Ryan's case*) (EK at 11).

C. Flow of Information – Requests, Responses and Provision

- (i) Canadian law
 - (a) Request by authorized persons

Pursuant to Section 230 of the ITA “(1) Every person carrying on business and every person who is required, by or pursuant to this Act, to pay or collect taxes or other amounts shall keep records and books of account (including an annual inventory kept in prescribed manner) at the person’s place of business or residence in Canada or at such other place as may be designated by the Minister, in such form and containing such information as will enable the taxes payable under the ITA or the taxes or other amounts that should have been deducted, withheld or collected to be determined.” A very broad definition of the word “record” has recently been introduced in the ITA. Subsection 248(1) of the ITA provides that a record includes “an account, an agreement, a book, a chart or table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan, a return, a statement, a telegram, a voucher, and any other thing containing information, whether in writing or in any other form.” The obligation imposed on taxpayers to keep records combined with the definition of the word “record” give Revenue Canada access to substantial and far-reaching sources of documents and information.

An authorized person⁶⁷ may for any purpose related to the administration or enforcement of the ITA inspect, audit or examine the books and records of the taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under the ITA. Section 231.1 of the ITA further allows the authorized person to enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept. If the documents referred to above are located in a “dwelling-house”, then the authorized person may not enter the dwelling-house without the consent of the occupant except under the authority of a warrant issued by a judge

⁶⁶ Section 232 ITA.

⁶⁷ An authorized person means a person authorized by the Minister for the purposes of Sections 231.1 to 231.5 of the ITA. Generally, an authorized person is an official holding a position of auditor or investigator at Revenue Canada.

pursuant to an *ex parte* application by the Minister⁶⁸. Under a previous version of section 231.3 of the ITA (which contains the rules pertaining to the issuance of a search warrant), the court had no discretion to refuse to grant a warrant. It was ruled to be invalid by the Supreme Court of Canada⁶⁹. The current version was introduced in order to give such discretion to the judge reviewing the *ex parte* application of the Minister.

In practice, search warrants are obtained by Revenue Canada under the provisions of the *Criminal Code*⁷⁰.

If Revenue Canada requires information or documents in connection with an audit, it will normally first ask for the information or documents orally or in an ordinary letter. In cases where the taxpayer refuses to co-operate, an authorized person⁷¹ notifies the person from whom the information or document is requested by the issuance of a formal demand under the provisions of subsection 231.2(1) of the ITA. The formal demand must stipulate the information or the document required as well as provide a reasonable delay in which such information or document shall be provided.⁷² The formal demand can be served either personally or by registered or certified mail.⁷³ Note that it was held that a formal demand to produce documents "without delay" does not satisfy the requirement that the taxpayer must be provided with a reasonable time within which to provide the information or document.⁷⁴ The formal demand must stipulate the information or document requested. Section 231 of the ITA provides that a "document" includes "money, a security and a record". One will recall the above-cited encompassing definition of the "record" found at subsection 248(1) of the ITA.

⁶⁸ Subsection 231.1(2) and (3) of the ITA.

⁶⁹ *Baron et al. v. R.*, [1993] 1 CTC 111. The use of the word "shall" instead of the word "may" in connection with the grant of a warrant was held to violate section 8 of the *Canadian Charter of Rights and Freedoms* because it did not give the judge any discretion to refuse to issue the warrant.

⁷⁰ R.S.C. 1985 c. C-46, as amended.

⁷¹ An official holding a senior position designated in the regulations.

⁷² A well-established custom is to give a period of 30 days to comply with the formal demand.

⁷³ Section 231.2 of the ITA.

⁷⁴ *Joseph et al. and Minister of National Revenue* (Ont. H. C.) 85 D.T.C. 5391.

In *Mckinlay Transport Ltd. v. The Queen*, the Supreme Court of Canada⁷⁵ ruled that a formal demand issued under the authority of the former subsection 231.2(1) ITA (at the time, the formal demand procedure was provided by subsection 231(3) ITA) constituted a seizure as it infringed on the expectations of privacy of a taxpayer. The Court also stated that the formal demand procedure contemplates "that parties who are not the subject of an investigation or audit can be compelled to produce documents relating to another taxpayer who is the subject of such investigation or audit" and that the compelled production reached beyond the strict filing requirements of the ITA.

* However, the Court took the position that such a procedure did not violate section 8 of the *Canadian Charter of Rights and Freedoms*. The Court was of the opinion that the Minister of National Revenue must be given broad powers in supervising the regulatory scheme to audit taxpayers' returns and inspect all records which may be relevant to the preparation of these returns.

In addition to the formal demand provided by subsection 231.2(1) ITA, the Minister of National Revenue may also serve another type of formal demand relating to one or more unnamed persons pursuant to subsections 231.2(2) and (3) ITA. The requirement relating to "unnamed persons" can be served once a judge, on an *ex parte* application, authorizes the Minister to impose on a third party a formal demand relating to an unnamed person or more than one unnamed person is satisfied that the person or unnamed persons are ascertainable and the formal demand is made to verify compliance by the person or persons with any duty or obligation under the ITA.

Pursuant to section 231.4 ITA, the Minister of National Revenue may authorize any person to make such inquiry as the person may deem necessary with respect to the administration and enforcement of the ITA. The hearing officer appointed under section 231.4 ITA has all the powers conferred on a commissioner by sections 4 and 5 of the *Inquiries Act* and those that may be conferred on a commissioner under section 11 of the *Inquiries Act*. The powers conferred by

⁷⁵ *Mckinlay Transport Ltd. v. The Queen*, [1990] 2 C.T.C. 103 (SCC).

section 231.4 ITA were ruled to be constitutional as they do not restrict the rights guaranteed by sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*.⁷⁶

Disclosure of confidential information

Tax authorities are prohibited from disclosing taxpayer information except as provided in the ITA. Section 241 of the ITA states:

"241(1) Except as authorized by this section, no official shall

- (a) knowingly provide, or knowingly allow to be provided, to any person any taxpayer information;
- (b) knowingly allow any person to have access to any taxpayer information; or
- (c) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the *Canada Pension Plan*, the *Unemployment Insurance Act* or the *Employment Insurance Act* or for the purpose for which it was provided under this section."

"(2) Idem. Notwithstanding any other Act of Parliament or other law, no official shall be required, in connection with any legal proceedings, to give or produce evidence relating to any taxpayer information."

(3) Communication where proceedings have been commenced. Subsections (1) and (2) do not apply in respect of

- (a) criminal proceedings, either by indictment or on summary conviction, that have been commenced by the laying of an information or the preferring of an indictment, under an Act of Parliament; or
- (b) any legal proceedings relating to the administration or enforcement of this Act, the *Canada Pension Plan*, the *Unemployment Insurance Act* or the *Employment Insurance Act* or any other Act of Parliament or law of a province that provides for the imposition or collection of a tax or duty.

(3.1) Circumstances involving danger. The Minister may provide to appropriate persons any taxpayer information relating to imminent danger of death or physical injury to any individual."

Pursuant to the ITA, disclosure of taxpayer information is prohibited unless it falls within the specific circumstances which allow for such disclosure. These circumstances are outlined in subsection 241(3)⁷⁷ and subsection 241(4) of the ITA which is set forth in Schedule D hereto.

⁷⁶ *The Queen v. Del Zotto et al.*, Supreme Court of Canada, unreported, file no. 26174, 21 January 1999.

⁷⁷ In *Slatery v. Doane Raymond Ltd. et al.*, 93 D.T.C. 5443, the Supreme Court of Canada allowed Revenue Canada to provide a taxpayer information in a bankruptcy proceeding on the basis that the information to be

Information relating to a taxpayer can always be provided to the taxpayer and to any other person with the consent of the taxpayer.⁷⁸

Strict procedural rules are followed in connection with the disclosure of taxpayer information. Memoranda of understanding exist between Revenue Canada and certain federal departments and agencies contemplated at subsection 241(4) ITA. Such memoranda provide, *inter alia*, a list of the persons authorized to request taxpayer information from Revenue Canada. This permits Revenue Canada to verify a person's authority to make a request, thereby expediting the administrative process. Requests for information are generally made in writing to Revenue Canada. In its reply to a request, Revenue Canada confirms the qualifying use that will be made of it and that it shall not be used for any other purpose. Officials of Revenue Canada responsible for the application of subsection 241(4) ITA are not authorized to provide taxpayer information to any governmental entity identified in subsection 241(4) ITA without a preliminary verification of the authority of the person requesting such information. When a request is made by an official of a federal department or agency with which no memorandum of understanding exists, extensive verifications are made of the ability of the official's identity and of his or her authority to make such request.

(ii) U.S.

(b) Request by authorized persons in the U.S.

The Secretary is authorized by Section 7602 of the IRC to examine any books or records and to summon the person liable for tax to appear before the Secretary to produce such books or records as well as to give testimony relating thereto. The summons shall be served by the Secretary and, if it requires the production of records or other document, such documents shall be clearly described therein. The Secretary has the authority to fix the time and place for the examination of the records and documents of a taxpayer. The only condition in doing so is that

disclosed before the Court was made for the administration of the ITA, i.e., the collection of a tax debt owed by the appellant's husband.

⁷⁸ Section 241(5) of the ITA. Information may also be obtained by the taxpayer under the *Access to Information Act* in accordance with subparagraph 241(4)(e)(i) of the ITA.

the time and place be reasonable under the circumstances. The date fixed in any summons shall not be less than 10 days from the date of the summons.

(c) Disclosure of confidential information

The IRC is similar to the ITA in that although all returns and return information are deemed confidential and, therefore, in general not subject to disclosure, the IRC sets forth several instances where disclosure is permitted. For example, the following disclosure is permitted by the IRC: to any person so designated by the taxpayer, to State tax officials and State and local law enforcement agencies, to persons having material interest (e.g., the taxpayer him/herself, spouses,), in the case of an income tax return filed jointly, to either of the individuals to whom the return is filed, in the case of a return of a partnership, to any person who was a member thereof for the years covered in the return, to Committees of Congress, to the President, and to Federal officers and employees for purposes of tax administration and in criminal investigations (e.g., to locate fugitives).⁷⁹

In the case where the taxpayer consents to, or requests, disclosure of its tax information to a third party, the Secretary shall comply with the request and provide the information unless "the Secretary determines that such disclosure would seriously impair Federal tax information".⁸⁰

Furthermore, the Secretary may refuse to disclose taxpayer information to State tax officials and State and local enforcement agencies if the Secretary determines that such disclosure would identify a confidential informant or seriously impair any civil or criminal investigation. It should be noted that taxpayer information is open to inspection by such State officials at all times, without making a specific request relating thereto, for the purposes of, and only to the extent necessary for, the administration of State tax laws⁸¹.

When a valid request has been made to the Secretary, return information disclosed may be provided in the form of written documents, reproductions of such documents, films or photo

⁷⁹ Section 6103 of the IRC, attached hereto as Schedule E.

⁸⁰ Section 6103(c) of the IRC.

⁸¹ Return and return information are also open, without written request, for inspection by employees of the Department of the Treasury.

impressions or by any other mode or means which the Secretary determines necessary or appropriate.⁸² Furthermore, the IRC provides that the Secretary shall maintain a record-keeping system pursuant to which all requests for inspection or disclosure of returns and return information is provided, which should include the reasons for and the date of such requests.⁸³

(iii) Canada

(d) Foreign-based information or documents

Under the ITA, Revenue Canada has the authority to solicit information or documents located outside Canada through a formal demand procedure specifically designed for those purposes.

In the case of foreign-based information or documents, section 231.6 ITA specifically permits the issuance of requirements in order to obtain such information. Foreign-based information or documents means any information or document that is available or located outside Canada and may be relevant to the administration or enforcement of the ITA. Section 231.6 ITA requirements may be issued at any stage of the assessment process⁸⁴ and may be served on both residents and non-residents of Canada⁸⁵. The failure by the person to provide the information or document requested can prohibit the introduction by that person of any foreign-based information covered by the formal demand in a civil proceeding relating to the administration or enforcement of the ITA.⁸⁶

However, the usefulness of the issuance of requirements to non-residents is significantly limited by Revenue Canada's inability to legally enforce its statutory powers of investigation beyond Canada's boundaries.

⁸² Section 6103 of the IRC.

⁸³ The record-keeping system shall be available for examination by the Joint Committee on Taxation or the Chief of Staff of such Joint Committee. Within 90 days after the close of each calendar year, the Secretary shall furnish such record-keeping to the Joint Committee on Taxation. Note that the record-keeping shall disclose, with respect to each federal agency, the number of requests for disclosure, the instances in which returns and return information were in fact disclosed, the taxpayers' returns, as well as the general purposes for which such requests were made.

⁸⁴ *Merko v. M.N.R.*, 90 DTC 6643 (FCTD).

⁸⁵ Subsection 231.6(2) ITA.

Because of the relative ease with which requirements may be enforced against residents of Canada, tax authorities may thus be tempted to use their own residents as conduits in order to obtain information that they would have more difficulties in obtaining directly from non-residents. This was done in *Spencer v. R.*⁸⁷ where a former manager of the Bahamian branch of the Royal Bank of Canada who had now returned to Canada was subpoenaed as a witness at the trial in Canada of an accused facing tax evasion charges who had dealings at that branch. In a unanimous decision, the Supreme Court of Canada held that the former branch manager could not refuse to testify on the ground that disclosure of the information requested could expose him to criminal charges in The Bahamas. In its decision, the Supreme Court indicated that any possible infringement on the liberty and security of the witness resulted from Bahamian law rather than Canadian law and dismissed all arguments made under the *Canadian Charter of Rights and Freedoms*⁸⁸ on that ground. LaForest J. expressly approved the reasons for judgment of the Ontario Court of Appeal. The latter distinguished its earlier decision in *Frischke et al. v. Royal Bank of Canada*⁸⁹ where it refused to compel the bank to force its Panamanian branch employees to provide records in breach of Panamanian law. *Frischke* was distinguished on the basis that the information sought in that case was located in Panama and was to be provided by persons residing in Panama while in the present case, the information sought was located in the memory of a Canadian resident citizen testifying in Canada. A distinction based on the location of the information and to a lesser extent, on the location of the witness, thus seems to exist under Canadian law.

It is thus fair to say that Revenue Canada's powers of investigation under the ITA are limited by the basic jurisdictional rule which prohibits a State from exercising sovereign powers beyond its borders. If a Canadian corporation or a Canadian branch of a foreign corporation is served with a requirement issued under section 231.6 ITA with which the recipient may not comply without being in breach of the laws of a foreign State in which the information is located,

⁸⁶ Subsection 231.6(8) ITA.

⁸⁷ *Spencer v. R.*, [1985] 2 S.C.R. 278, 85 DTC 5446, [1985] 2 CTC 311.

⁸⁸ *Canadian Charter of Rights and Freedoms Constitution Act 1982*, Schedule B of *Canada Act, 1982*, c. 11 (UK).

⁸⁹ *Frischke et al. v. Royal Bank of Canada*, (1977), 17 O.R. (2d) 388, 80 D.L.P. (3d) 393.

it would appear that such requirement should be set aside as unreasonable under paragraph 231.6(5)(c) ITA.

Moreover, it should be noted that the issuance of requirements to Canadian corporations in order to obtain information from related foreign companies may not in any event be possible under Canadian law. In the context of the application of the Federal Court rules dealing with the production of documents in the custody of third parties, it was held in *Bowlen v. R. (No. 2)*⁹⁰ that a requirement served on a corporation does not cover documents in the possession of its subsidiaries. In *Indalex Limited v. R.*⁹¹, Walsh J. conducted a thorough review of the caselaw on that issue and held that an officer of a Canadian corporation could not be compelled to inform himself about a related company not a party to the proceedings.

If the requirement is issued under section 231.2 ITA in order to circumvent the judicial review provided under subsection 231.6(5) ITA, then the recipient should be able to argue that, being unable to comply without breaching foreign law, compliance should be excused under subsection 231.5(2) ITA⁹². It is unclear whether a requirement under section 231.2 or 231.6 ITA should be complied with if the obligation to comply with such requirement in Canada is a valid defence under foreign law to the offence which compliance with such requirement may entail. In any event, the availability of the defence under foreign law would first have to be ascertained. Any test falling short of ensuring that the availability of the defence under foreign law is a certainty could potentially lead to unreasonably harsh results and hence, should not be applied.

While information benefiting from the solicitor-client privilege is expressly protected from domestic requirements made under section 231.2 ITA, no such express protection is found in the context of requirements for foreign-based information issued under section 231.6 ITA. However, there is no reason why foreign solicitors should not be able to have a section 231.6 ITA requirement to provide privileged information set aside as unreasonable under paragraph 231.6(5)(c) ITA. This is in fact just a specific example of a case where compliance would result

⁹⁰ *Bowlen v. R. (No. 2)*, [1978] 1 F.C. 798, 77 DTC 5433, [1977] CTC 531, 5 C.P.C. 215 (F.C.T.D.).

⁹¹ *Indalex Limited v. R.*, 84 DTC 6018 (FCTD) aff'd 84 DTC 6492 (FCA).

⁹² See D.W. Smith, "Powers of Investigation" 82 CMC 122 at 152.

in a breach of foreign law and put the recipient in an untenable "lose - lose" situation. In light of the foregoing, it would seem unlikely that the *Vetco* case would be followed in Canada.

(iv) U.S.

Section 982 of the IRC provides the rules relating to obtaining foreign-based documents. These rules should be used initially in order to obtain a foreign document.

In the case of *U.S. v. Vetco Inc.*⁹³, the Internal Revenue Service issued summonses to Vetco Inc. as well as to its accountants and lawyers in order to force the disclosure of information regarding Vetco's Swiss subsidiary. The Court held that possible criminal liability of the accountants and lawyers in Switzerland did not preclude the enforcement of the summonses and the imposition of sanctions for non-compliance. In reaching its conclusion, the Court considered that the interest of the U.S. outweighed the Swiss interest. It distinguished the case of *Société internationale pour participations industrielles v. Rogers*⁹⁴ where the Court refused to dismiss a plaintiff's complaint with respect to a failure to comply where the plaintiff had made extensive good efforts to comply. *Société internationale* was distinguished on two grounds: 1) the Court found that, unlike in *Société internationale*, the recipients of the summonses had made no bona fide efforts to comply and 2) the request at issue in *Société internationale* was a civil discovery order which served a less pressing national function than IRS summonses issued pursuant to an investigation of potentially criminal conduct. Similar conclusions were reached in *U.S. v. Quigg*⁹⁵, *Public Admin. v. Royal Bank of Canada*⁹⁶ and *In Re Grand Jury Proceedings the Bank of Nova Scotia United States v. Bank of Nova Scotia*⁹⁷. In these last three cases, U.S. branches of Canadian banks were forced to obtain and divulge information with respect to client accounts held by non-U.S. branches or subsidiaries of the

⁹³ *U.S. v. Vetco Inc.*, (1981) 1 USTC 9428 (CA 9th cir.) (May 11, 1981) (EK at 22).

⁹⁴ *Société internationale pour participations industrielles v. Rogers*, 357 U.S. 197, 78 S. Ct. 1098, 2 L. Ed. 2d 1255 (1958).

⁹⁵ *U.S. v. Quigg*, 81-2 USTC 9732.

⁹⁶ *Public Admin. v. Royal Bank of Canada*, 19 N.Y. 2d 127; 278 N.Y. S2d 378 (NYCA, 1976).

⁹⁷ *In Re Grand Jury Proceedings the Bank of Nova Scotia United States v. Bank of Nova Scotia*, 740 F. 2d 817 (11th Cir. 1984).

banks. These cases have been criticized⁹⁸ and are not readily applicable in Canada considering Canada's less aggressive approach with respect to the extraterritorial application of its statutes as evidenced by its location-based approach.⁹⁹ Not surprisingly, Canada sent an *amicus curiae* to the U.S. Government in connection with the *Bank of Nova Scotia* case questioning the U.S. actions considering that the information was located in the Cayman Islands.¹⁰⁰

To summarize, all taxpayer information is confidential. Tax officials have the right to such information when reviewing such information as set forth in the tax returns. Furthermore, when auditing an individual or a company, tax officials have the right to request and obtain any information or document required to complete such audit. When the information requested is situated in Canada or the United States, as the case may be, the rules provided in either the IRC or the ITA with respect to gathering such information apply. However, due to the limited ability to apply domestic investigatory powers in an international context, the exchange of information provisions provided in the Canada-U.S. Convention becomes essential.

(v) Canada-U.S. Convention

(e) Requests by authorized persons

Before making a request for information, the requesting state must first ascertain that all of the prerequisites to the making of such request have been met. These prerequisites are outlined in Revenue Canada's Exchange of Information Guide¹⁰¹ (the "Guide").

In the case of an exchange of specifically requested information, the information must be specific and must relate to one or more particular taxpayers¹⁰². In that respect, the Guide states clearly that: "The Exchange of Information Article must not be used as a means of embarking on

⁹⁸ J. Fried, "L'application extraterritoriale des lois et les politiques canadienne et américaine en matière d'extraterritorialité" (1986), 3 *Revue québécoise de droit international* 337; J.-G. Castel, "Compelling Disclosure by a Non-Party Litigant in Violation of Foreign Bank Secrecy Laws: Recent Developments in Canada-United States Relations" (1985) 23, *The Canadian Yearbook of International Law* 261.

⁹⁹ J. Fried, *ibid.*

¹⁰⁰ Brief of the Government of Canada as *Amicus Curiae* in Support of Petition for Writ of Certiorari, October 23, 1984.

¹⁰¹ T4121, as amended, attached as Schedule F hereto.

¹⁰² Section 3.3 of the Guide.

"fishing expeditions".¹⁰³ If the request involves the issuance of a requirement to unnamed persons by the other state, a prior judicial authorization should be obtained since such prior authorization is compulsory in a domestic context for requests to unnamed persons under subsection 231.2(3) of the ITA.

In addition, Revenue Canada appears to limit its requests for information to situations where "a significant amount and/or principle" is involved.¹⁰⁴

More importantly, a request may only be made after "a reasonable effort has been made to obtain the information from Canadian sources" and that all such sources have been exhausted.¹⁰⁵ The latter prerequisite is consistent with subparagraph 9(a) of the Commentary to the 1992 OECD Model which provides that "internal taxation procedure should be relied upon before request for information is made to the other State."

If it can reasonably be expected that the requested state will need to conduct a search or seizure in order to obtain the information, then no request can be made with respect to such information until prior judicial authorization has been obtained in Canada. This conclusion is reached in the light of the recent decision of the Federal Court of Appeal in *Schreiber v. Canada (Attorney General)*¹⁰⁶. The court clearly stated that "a Government cannot use the need for international assistance as an excuse to justify its own constitutionally impermissible conduct."

The request procedure is internal since the taxpayer in respect of whom information is sought needs not be notified. Based on the instructions contained in the Guide, an auditor wishing to make a request for information must submit his request to the District Office TORT committee or the International Audit Section of the International Tax Program Directorate.

When a request of information is received from a treaty partner, the International Tax Program Directorate must first determine whether or not the request complies with the Canada-

¹⁰³ Section 3.3.1 of the Guide.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Schreiber v. Canada (Attorney General)*, [1997] FCJ 277.

U.S. Convention.¹⁰⁷ In order to satisfy itself that the Canada-U.S. Convention has been complied with, one would expect the International Tax Program Directorate to obtain sufficient evidence that, *inter alia*, the information sought would be obtainable under the treaty partner's domestic laws. In an American case, an application for the enforcement of an IRS summons issued in furtherance of a Norwegian request for information was denied because the IRS failed to adduce satisfactory evidence that its enforcement would not be inconsistent with Norwegian law.¹⁰⁸

Once it has been established that a request for information complies with the Canada-U.S. Convention, the delicate task of fulfilling such request begins. If all of the information sought is not already on hand, the Canada-U.S. Convention requires that efforts be undertaken in order to obtain the missing information and domestic powers of investigation need to be exercised.

If a requirement is issued, then the purpose for which it is issued must be disclosed to the recipient. This is known as the "fair notice doctrine" and the failure to give such fair notice may invalidate the requirement.¹⁰⁹ However, it is not necessary that the purpose of the requirement be communicated to the recipient in writing. It suffices that the recipient be orally advised of the purpose for which it was issued.¹¹⁰

(f) Disclosure

Exchanges of information under Article XXVII of the Canada-U.S. Convention are subject to the reciprocity principle. Reciprocity is well-entrenched in the exchange of information provisions of all of our tax treaties, including the older ones. Essentially, it ensures a level playing field for both contracting States and minimizes embarrassing situations. The reciprocity principle is at the root of subparagraphs 26(2)(a) and (b) of the 1992 OECD Model Canada-U.S. Convention. Subparagraph 26(2)(a) essentially provides that a contracting State is not obliged to carry out administrative measures at variance with its laws and administrative

¹⁰⁷ Section 3.3.2 of the Guide.

¹⁰⁸ *Lincoln First Bank et al. v. U.S.*, (1980) (So. Dist. NY) (M-18-304, 2/14/80) (EK at 19).

¹⁰⁹ *Montreal Aluminium Processing Limited et al. v. M.N.R.* 92 DTC 6567 (FCA) rev'g 91 DTC 5424 (FCTD).

¹¹⁰ *Thomas G. Andison v. MNR*, 95 DTC 5058 (FCTD).

practice or the laws and administrative practices of the other contracting State. Subparagraph 26(2)(b) provides that a contracting State is not obliged to supply information which is not obtainable under its laws or in the normal course of its administration or under the laws or in the normal course of administration of the other contracting State.

It should be noted that in the absence of reciprocity, the requested State has the discretion and not the obligation to refuse the request for the exchange of information under the treaty. Paragraph 17 of the Commentary to Article 26 of the 1992 OECD Model Convention provides as follows:

"The requested State is *at liberty* to refuse to give information in the cases referred to in the paragraphs above. However if it does give the requested information, it remains within the framework of the agreement on the exchange of information which is laid down in the Canada-U.S. Convention; consequently it cannot be objected that this State has failed to observe the obligation to secrecy."
[emphasis added]

The second sentence of paragraph 17 fails to address the possibility that the requested State is precluded under its domestic laws from disclosing information when it has no obligation to do so under a treaty. For instance, domestic legislation might only permit the disclosure of such information as is required under a treaty. However, this is not the case in Canada. Subparagraph 241(4)(e)(xii) ITA allows Revenue Canada to provide taxpayer information "... for the purposes of ... a provision contained in a tax convention ..." and hence, allows the disclosure of information which Canada has the discretion not to disclose. There is no Canadian jurisprudence yet on the issue of whether a requested State may incur civil liability for disclosing prejudicial information in respect of which it enjoys the discretion not to disclose.

Because the domestic laws of a State may be more restrictive than the laws of another State with respect to the scope of the information which may be supplied in fulfilment of a request for information made under the Canada-U.S. Convention, a State may obtain information which it would not be in a position to provide if an identical request were made by the other State. While the exchange of information obligations contained in our tax treaties are reciprocal, differences in domestic legislation lead to asymmetric exchanges.

Considering that domestic legislation plays a determinative role in defining the scope of the information which may be exchanged pursuant to a treaty, it is particularly relevant to examine the way in which such legislation is applied in that context.

Generally, Revenue Canada may only exercise its investigatory powers for purposes related to the administration or enforcement of the ITA¹¹¹. However, paragraph 16 of the Commentary to Article 26 of the 1992 OECD Model Convention provides that "... the requested State has to collect the information the other State needs in the same way as if its own taxation was involved...". In *Montreal Aluminium Processing Limited et al. v. M.N.R.*¹¹², the Federal Court considered those words and held that requirements under section 231.2 ITA could be issued in respect of information requested by the U.S. authorities.

The U.S. permit the IRS to obtain more information pursuant to a treaty request than would be possible in a purely domestic context. The U.S. courts have held that the recipient of a summons issued by the IRS in connection with a request for information made under a treaty does not benefit from the constitutional safeguards provided under U.S. law which prevent the issuance of summons once a criminal investigation has been referred to a Grand Jury¹¹³.

There are three types of information exchanges which govern all of the Canadian and U.S. tax conventions.

The first type of information exchanged is referred to as "automatic" or "routine". This usually involves information slips made in Canada or the U.S. by a non-resident individual or company which are automatically sent out by one state to another, without any prior request, relating to such things as dividends, interest, etc. In these instances, the Canadian and U.S. tax authorities automatically forward the tax information relating to these non-residents to the tax authorities in the state in which such individual or company is a resident.

¹¹¹ See e.g. subsection 231.1(1) of the Income Tax Act.

¹¹² *Montreal Aluminium Processing Limited et al. v. M.N.R.*, 91 DTC 5424 (FCTD) rev'd on other grounds 92 DTC 6567 (FCA).

¹¹³ See: *U.S. v. Manufacturers and Traders Trust Company*, 83-1 USTC 9263 (CA 2nd Cir); *U.S. v. Stuart et al.* 89-1 USTC 9185 (US Sup. Ct) (February 28, 1989).

The second type of information exchange is referred to as specific exchanges. This involves a specific request made by the tax authorities of one state to the tax authorities of another when there are no other means of obtaining the information required through domestic channels. Treaty partners are obliged to respond to these requests as though they were carrying out a tax investigation for their own purpose.

The third type of exchange is referred to as spontaneous exchanges. This involves exchanging information which a state, when proceeding with an audit of an individual or a company, uncovers information which is believed may be of interest or use to another state. The state will spontaneously forward the information to the other state.

It is important to note that in the U.S., although Section 6103 of the IRC allows the exchange of information with other U.S. law enforcement agencies, this is not the case when the information is exchanged pursuant to the Canada-U.S. Convention as the convention limits the exchange to tax matters.

(vi) Current Administrative Practices

(g) Canada

When an auditor or investigator determines that information from a foreign authority is required and thus a specific request needs to be made, he or she shall forward a request to either the tax services office, International Audit Section, Special Investigations Section or the Taxation of Offshore Related Transactions Committee who will forward it to the International Tax Directorate. It is important that prior to making a request, the auditor or investigator must have made all reasonable efforts to obtain the information from Canadian sources. This includes consideration of Section 231.6 of the *ITA* with respect to foreign-based information or document. The International Tax Directorate reviews the auditor's or investigator's request and will forward it to the competent authority of the treaty partner. Information which is spontaneously exchanged, i.e. information that an auditor or investigator becomes aware of during the course of an audit or investigation, is also transmitted by the auditor or investigator to the International Tax Directorate through the International Audit Section, Special Investigations Section or the Taxation of Offshore Related Transactions Committee. The International Tax Directorate

reviews the information and forwards it to the treaty partner. Judicial authorization to forward the information is not required.

When a treaty partner forwards information spontaneously to the International Tax Directorate, the International Tax Directorate refers it to the appropriate tax services office to decide what use will be made of the information.

Specific requests for information made by a treaty partner, in this case the U.S., also pass through the International Tax Directorate which examines such requests to ensure that they comply with the Canada-U.S. Convention. Once the International Tax Directorate has determined that the request meets the criteria set forth in the treaty it shall forward it to the appropriate tax services office for action. Once the auditor or investigator has obtained the information, either because it is already on file or because an investigation has been completed, he or she shall prepare a memorandum containing the information and forward it to the International Tax Directorate, who shall finalize the reply, sign it and send it to the requesting authority. Judicial authorization is not required to exchange the information collected pursuant to a specific request.

(h) U.S.

In the U.S., the competent authority is the Assistant Commissioner (International). All requests for information and the provision of information must go through the Assistant Commissioner (International).

As noted above, spontaneous exchanges of information involve information uncovered during an audit which the tax official thinks will be useful to a treaty partner. The tax official who uncovers such information shall forward it to the Assistant Commissioner (International) who shall review it and send it to the relevant foreign authority. Judicial authorization is not required in order to transmit such information. When the competent authority in the U.S. receives spontaneously-transmitted information from a foreign authority, the competent authority examines the information and, if it decides that action should be taken, it is then forwarded to the local tax authorities.

Should, in the course of an examination or investigation, a tax official require information from a foreign authority, the tax official shall prepare a detailed written request which it shall submit to the Assistant Commissioner (International). The request shall be as detailed as possible so that the foreign competent authority shall easily understand the needs of the requesting state. The Assistant Commissioner (International) reviews the request and forwards it directly to the competent authority in the foreign jurisdiction. The Assistant Commissioner (International) does not need to obtain judicial authority to transmit the request to the foreign authority.

According to the Exchange of Information Field Guide ("**Field Guide**")¹¹⁴, requests for information from the U.S. are sent by the foreign authority to the Assistant Commissioner (International) who reviews the request to determine whether it is acceptable.¹¹⁵ If the request is acceptable, it is forwarded to the appropriate district office. If the request involves summons activity, the request will be directed to the Director Office of International Programs who obtains such information. The information requested can be of the following two types: i) information that is already on file with the tax officials or ii) information which requires a taxpayer interview, a tax investigation or a third party contact. The only important consequence of the type of information requested is the time it will take to obtain the requested information, the latter type being more time-consuming. Furthermore, in collecting this information the tax official is obliged to apply its own domestic laws.

Once the information is obtained, it is then forwarded to the competent authority who reviews it to determine if it can be forwarded to the requesting state. The competent authority shall provide a statement as to the limits of the use on the information. It is the competent authority who decides whether the information should in fact be transmitted. For example, the competent authority might decide that disclosing the information would be contrary to public policy. Judicial authority is not required to transmit the information obtained.

¹¹⁴ The Office of the Assistant Commissioner (International), Office of International Programs, Tax Treaty Division Exchange of Information Field Guide, attached as Schedule G hereto.

¹¹⁵ According to the Field Guide, in determining whether the request is acceptable, the Competent Authority considers, among other things, whether the conditions set forth in the exchange of information articles are fulfilled, whether the information requested is of a nature that can be provided and whether the confidentiality of the information provided is likely to be protected.

Canadian Tax Law Request (via International Tax Directorate) to U.S. (Assistant Commissioner – International)

The International Tax Directorate, as the relevant Canadian authority, can request information from its American counterpart, the Assistant Commissioner (International) without needing to seek judicial authorization. The possible request scenarios are as follows:

- to make a request or to exchange information when the U.S. government has the information and the information has either been voluntarily supplied to the U.S. government or obtained by the U.S. government in the normal course;
- to make a request (provided reciprocity exists) or to exchange information when the U.S. government has the information which it obtained through an investigation;
- to make a request (unless judicial authorization would have been required under section 231.1 (search warrants), subsection 231.2(2) (unnamed persons) or subsection 231.1(2) (dwelling house)) or to exchange information when Canada requests the U.S. to collect the information.

Voluntary Supply by Canadian Tax Law Authority of Information to U.S. Tax Law Authority Without Specific Request

Canada can voluntarily supply tax information to the U.S. without receiving a specific request and without needing to seek judicial authorization. The types of information which could be involved in this situation are:

- to supply information which the Canadian government has obtained voluntarily or in the normal course;
- to supply information (except where documents or information are subject to an impounding order from the Court) which the Canadian government has obtained pursuant to an investigation;

U.S. requests for Tax Information from Canada

Canada can respond to American requests for tax information without seeking judicial authorization. The possible request scenarios are as follows:

- to make a request or to exchange information when the Canadian government has the information and the information has either been voluntarily supplied to the Canadian government or obtained by it in the normal course;
- to make a request or to exchange information (except where there is an impounding order from the Court) when the Canadian government has the information which it obtained through an investigation;
- to make a request or to exchange information (unless judicial authorization would have been required under section 231.1 (search warrants), subsection 231.2(2) (unnamed persons) or subsection 231.1(2) (dwelling house)) when Canada requests the U.S. to collect the information.

U.S. Responses to Canadian Requests for Tax Information

American tax authorities can respond to Canadian requests for information without seeking judicial authorization. The possible request scenarios are as follows:

- to supply information which the U.S. government has obtained voluntarily or in the normal course;
- to supply information which the U.S. government has obtained pursuant to an investigation;

(vii) MLAT

Both the U.S. and Canada can obtain foreign evidence and other types of assistance for criminal tax cases through the MLAT. In the U.S., if there might be a criminal tax element to an

inquiry, the tax officer should inform the Assistant Commissioner (International) who decides the basis under which such information will be sought.¹¹⁶

D. Penalties for Improper Disclosure of Confidential Information

(i) Canada

A person who contravenes Section 241 of the ITA, which prohibits disclosure of, access to, or use of, taxpayer information is guilty of an offence and liable on summary conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding 12 months, or both.¹¹⁷ Furthermore, as was noted above, the ITA provides specific circumstances when, and specific purposes for which, taxpayer information can be disclosed. Should the person to which the information is disclosed knowingly use, provide to any person, allow the provision to any person of, or allow any person access to, such information such person is also guilty of an offence and liable on summary conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding 12 months, or to both.¹¹⁸

(ii) U.S.

If a return or return information is wilfully disclosed other than as provided in the IRC by any officer or employee or former officer or employee of the United States, such violation constitutes a felony punishable upon conviction by a fine in any amount not exceeding \$5,000 or imprisonment of not more than 5 years, or both. Furthermore, if the offence is committed by an officer or employee of the United States, upon conviction, such officer or employee shall be dismissed or discharged.¹¹⁹ Furthermore, any person who wilfully discloses a return or return information acquired by him or by another person shall also be liable to a fine of not more than \$5,000 or imprisonment of not more than 5 years, or both.¹²⁰ The IRC provides the same penalty to a person to whom a return or return information is disclosed in a manner which is unauthorized by the IRC who prints or publishes such information. Finally, the same penalty is

¹¹⁶ Page 2 of the Field Guide.

¹¹⁷ Section 239(2.2) of the ITA.

¹¹⁸ Section 239(2.21) of the ITA.

¹¹⁹ Section 7213 of the IRC.

imposed upon persons who wilfully offer any item of material value in exchange for any return or return information and to receive such information.

Furthermore, the taxpayer can institute a civil action for damages against the U.S. should an officer or employee of the IRS wilfully disclose return information.¹²¹ Similarly, the taxpayer can institute a civil action for damages against a person who is not an employee of the IRS who discloses return information.¹²²

(iii) Canada-U.S. Convention

• Unauthorized disclosure of taxpayer information constitutes an offence under subsection 239(2.2) ITA. Whether improper disclosure was made in a purely domestic context or in a treaty context, it remains a punishable offence.

In the US, courts have ruled that information improperly obtained by a tax treaty partner in furtherance of a U.S. request for information constitutes inadmissible evidence if the way in which it was obtained by the treaty partner would have been equally unlawful in the US.¹²³

In a Belgian case, the Court held the Belgium tax authorities liable for the prejudice caused by the improper disclosure of taxpayer information to the Italian tax authorities.¹²⁴ In that case, a Belgian firm paid kickbacks to purchasing agents of various Italian firms. The Italian authorities wanted to have the names of the purchasing agents in order to assess them for Italian tax. This information was held to constitute a business secret which the Belgian authorities had a duty not to disclose knowing that it would harm one of its taxpayers.

This case contradicts the statement made at paragraph 17 of the Commentary to Article 26 of the 1992 OECD Model to the effect that it may not be objected that a State has failed to

¹²⁰ Ibid.

¹²¹ Section 7431 of the IRC.

¹²² Section 7431 of the IRC.

¹²³ *U.S. v. Wolf*, F.Supp 435 (N.D. Ill 1984); *U.S. v. Popovitch*, 79-2 USTC 9732 (October 26, 1979) (Dist. Ct. Fl., Hodges J.).

¹²⁴ Belgium/Italy Sept 5, 1980 Brussels Court of Attachment (European Taxation March 1987 at p. 87) (EK at 8.2003).

observe its obligations to secrecy by disclosing information which it had discretion not to disclose under a tax treaty.

In Canada, the Crown will incur civil liability if the improper disclosure of information constitutes an actionable tort in respect of which it does not enjoy any immunity.

The Crown generally incurs no liability when it makes policy decisions while it may incur liability as a result of its operational decisions provided that certain conditions are satisfied.

The policy/operational dichotomy has been abandoned in England¹²⁵ but it is still alive in Canada¹²⁶. Its abandonment in England is most likely related to the difficulties associated with its application and the important grey zone between true policy decisions and purely operational decisions.

In the *Brown*¹²⁷ case, Cory J. explained the distinction as follows:

"In distinguishing what is a policy decision and what is operations, it may be helpful to review some of the relevant factors that should be considered in making that determination. These factors can be derived from the following decisions of this Court: *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; *Barratt v. District of North Vancouver*, [1980] 2 S.C.R. 418; and *Just, supra*; and can be summarized as follows:

True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.

¹²⁵ *Rowling v. Takaro Properties Ltd.*, [1988] A.C. 473.

¹²⁶ *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445.

¹²⁷ *Ibid.*, at 441.

The operational area is concerned with the practical implementation of the formulated policies, it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness."

Of course, the policy/operational distinction is only applied once it has been determined that the decision was *intra vires*. This point was clearly made by Stone J.A. in *R. v. Comeau Sea Foods Limited*:

"The underlying assumption regardless of whether the decision is one of policy or is operational appears to be that the public authority made it in the exercise of its statutory power. If the decision lies outside the statute, in my view, it could not be saved by being of a "policy" nature simply because there would be nothing to be saved."¹²⁸

It follows that if disclosure is made in contravention with the applicable treaty and/or law, then it attracts the Crown's liability no matter if it was made by the Minister of National Revenue or the Cabinet as a matter of policy.

In cases where the decision was within the boundaries of statutory authority, the policy/operations test must be applied. These cases include, *inter alia*, instances where the law is negligently applied. Among the latter cases, those which involve the negligent exercise of discretionary powers are the most difficult.

The above analysis of the various limitations to the disclosure of information under the Canada-U.S. Convention has revealed that in many important areas, such as commercial and professional secrecy, Canada has discretion not to disclose the information. The question of whether liability lies if such discretion is exercised in a prejudicial manner cannot be easily answered.

¹²⁸ *R. v. Comeau Sea Foods Limited*, [1995] 2 C.F. 467 at 477.

On the one hand, the exercise of such discretion is made on a case by case basis in implementing the Canada-U.S. Convention and hence, cannot be characterized as a true policy decision. On the other hand, there is a certain level of policy involved in its exercise considering that disclosure may be aimed at receiving reciprocal treatment from our treaty partner in similar circumstances.

E. Safeguards

(i) Canada

The safeguards in the ITA relate to the fact that information can be disclosed only for the specific purposes set forth in subsection 241(4) of the ITA. Should information be disclosed for purposes other than those which are stated in subsection 241(4), then the person who discloses the information and the person who knowingly uses the information for other purposes will be sanctioned.

(ii) U.S.

The IRC provides specific provisions with respect to the safeguarding of confidential information once it has been disclosed in conformity with the provisions of Section 6103 thereof. In fact, in order for an agency, body or commission to receive returns or return information, they must establish and maintain, to the satisfaction of the Secretary, a permanent system of record-keeping with respect to any requests, the reason for such request, the date of such request and the information disclosed. Furthermore, such agency, body or committee must establish and maintain a secure area or place in which such returns or return information shall be stored. Access to such returns or return information shall be restricted only to persons whose duties or responsibilities require access. Furthermore, the IRC provides that the Secretary may provide such other safeguards which it deems necessary to protect the confidential nature of the returns or return information which must be followed by such agency, body or committee.¹²⁹

¹²⁹ Section 6103 of the IRC.

(iii) Canada-U.S. Convention

The information obtained may only be disclosed to persons involved in the assessment, collection or enforcement of the taxes covered by the Canada-U.S. Convention and the information may be used only for such purposes.

5. CONCLUSION

In the areas of securities and income tax laws, the rules relating to confidentiality and mutual assistance have developed so that the relevant government authority; that is, either the securities commission or the Minister of Revenue, has the authority to determine whether information will be communicated to a foreign authority.

The exchange of information in the area of securities matters is mostly performed on an informal basis. Although it does provide some specific procedures for assistance and exchanges of information, the MOU's main purpose is to confirm the intention of the parties, which is to cooperate with one another and to provide information and assistance in the fullest manner possible. Therefore, much of the manner in which information is exchanged is based upon informal, unwritten practices.

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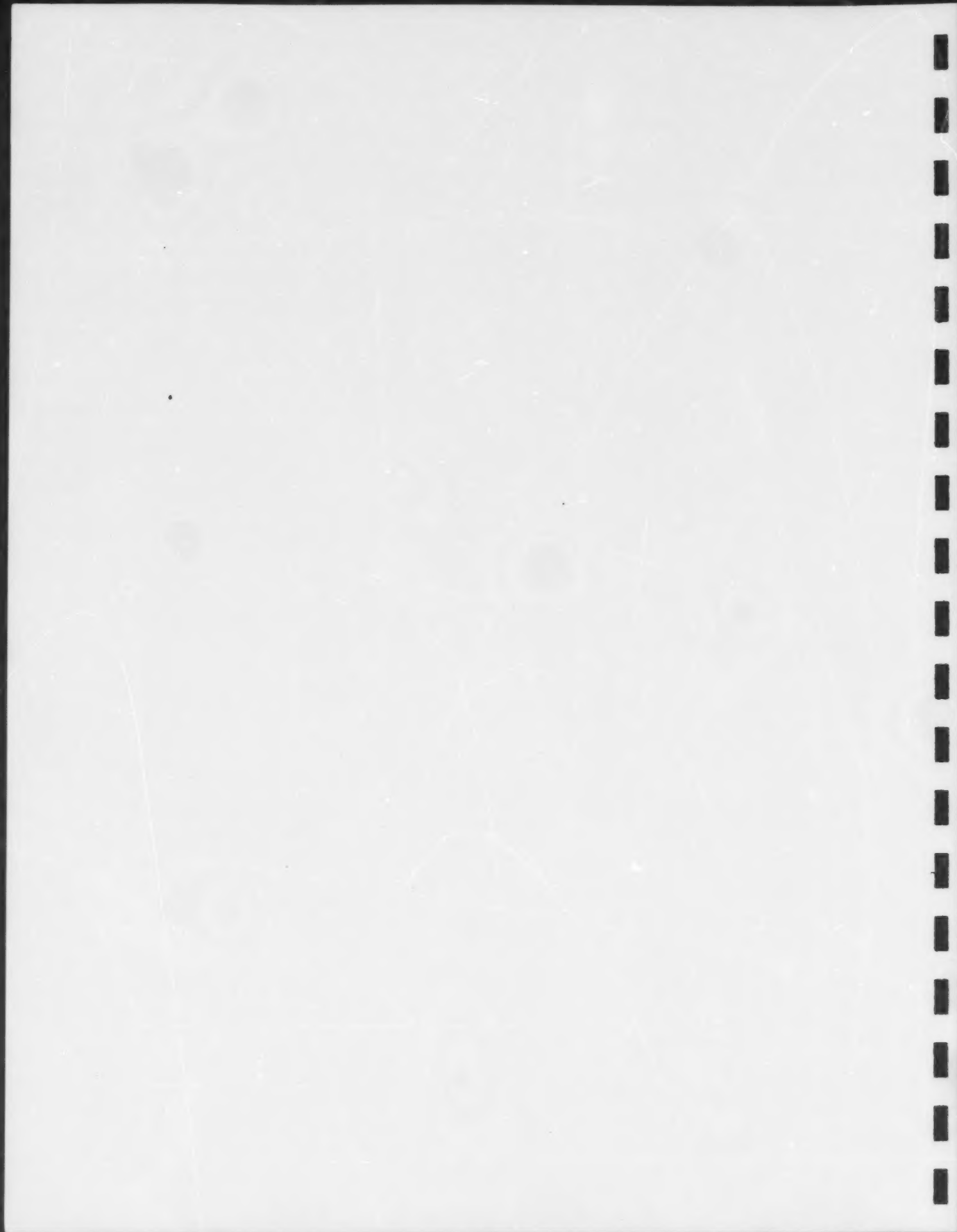
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SCHEDULE A
BULLETIN ON CONFIDENTIALITY



CONFIDENTIALITY AND MUTUAL ASSISTANCE IN ENFORCING COMPETITION LAWS

1. Background

Currently, s. 29 of the *Act* addresses the confidentiality of information obtained under the *Act*. It prohibits the communication of certain specified categories of information "except to a Canadian law enforcement agency or for the purposes of the administration and enforcement" of the *Act*. This prohibition does not apply to any information that has been made public. In addition, s. 10(3) requires that all inquiries by the Director be conducted in private.

Stakeholders have a number of concerns about the confidentiality protections afforded information obtained by the Director in the administration or enforcement of the *Act*. First, the protection accorded confidential information under the *Act* is not comprehensive. For example, s. 29 does not protect information that is provided voluntarily to the Bureau.

Second, there are differing views on the extent to which s. 29 permits the Bureau to communicate confidential information. On the one hand, it is customary and often necessary for effective law enforcement for law enforcement agencies to communicate confidential information selectively to third parties and other law enforcement agencies to advance their investigations. On the other hand, the type of information relevant to investigations under the *Act* is often commercially sensitive. If this information came into the hands of competitors or other parties indiscriminately, it might be harmful to the business interests of the information provider.

Third, communicating information to a foreign competition law authority has the potential to result in private antitrust litigation outside of Canada, particularly in the case of the United States. There is also a concern about the potential harm to Canada's national interests if the information is given to other agencies of a foreign government.

Finally, there is the question of the place and scope of international antitrust cooperation in light of the enactment of blocking statutes in Canada to protect against the extraterritorial application of foreign laws. There has been a more recent countervailing trend involving joint investigations between the Bureau and the Antitrust Division of the U.S. Department of Justice, where confidential information was exchanged which resulted in enforcement action that would not otherwise have occurred absent such cooperation. This new spirit of cooperation is also reflected in the August 1995 agreement between Canada and the United States regarding the application of their competition and

deceptive marketing practices laws.

Accordingly, an appropriate balance between effective law enforcement and the concerns of information providers needs to be struck.

2. The Public Consultations

The Bureau's discussion paper sought comments on a number of issues in relation to confidentiality and mutual assistance. In the domestic context, these were:

- whether all **information** in the Bureau's possession, including that voluntarily provided, should be subject to the same general level of statutory protection;
- how the *Act* should be amended to clarify the Director's authority to communicate **confidential information** for the purposes of:
 - advancing an investigation or assisting in the administration of the *Act*;
 - negotiating an alternative case resolution;
 - assessing the value of evidence or the credibility of witnesses by communicating **confidential information** to industry participants; and,
 - correcting the record in the event a party misleads a tribunal in the course of the Director's intervention under ss. 125 or 126.
- how the *Act* should be amended to clarify the Director's authority to refer complaints to other government agencies involving matters which fall within their jurisdictions; and,
- how the *Act* should be amended to clarify the Director's authority to communicate **information** in his possession to assist Canadian law enforcement agencies in carrying out their duties.

The discussion paper also solicited views on a mutual assistance regime involving communicating **confidential information** to foreign competition law authorities in relation to a Bureau or joint investigation or to assist in a foreign competition law authority's investigation. Mutual assistance could include authorizing the Director to:

- use compulsory powers to obtain **information** for the enforcement of another country's competition laws; and,
- provide a foreign authority with **information** relevant to the enforcement of the *Act* or foreign competition law.

The Bureau asked recipients of the discussion paper:

- whether such mutual assistance is generally in the public interest;
- what safeguards would be appropriate to ensure that assistance would not occur in specific cases where it would be contrary to the public interest;
- whether the full range of compulsory powers available under the *Act* should be available to assist foreign authorities;

- whether certain categories of **information** should be exempted from **communication** under a mutual assistance regime and how exempt **information** should be defined without unduly hindering effective cooperation;
- what safeguards are appropriate to ensure that **information** communicated to a foreign authority is not used, or communicated to third parties, for purposes unrelated to the enforcement of the foreign **competition law**; and,
- in deciding whether to enter into a particular mutual assistance agreement under the proposed regime, what factors should be considered.

Commentators overwhelmingly agreed that all **information** in the Bureau's possession should fall within the *Acfs* confidentiality protections. However, opposition outweighed support for giving the Bureau broad discretion to communicate **confidential information** domestically. Commentators preferred a narrowly defined set of circumstances absent which it would be prohibited from such communications. Views on the Bureau's authority to refer complaints were mixed. Those who were opposed questioned the necessity for such authority.

Responses were also mixed on whether communicating **information** in the Bureau's possession to assist Canadian law enforcement agencies in carrying out their duties is in the public interest. In deed, some felt the Bureau's authority to communicate to Canadian law enforcement agencies should be curtailed, since the Bureau's expertise is in **competition law** matters, not other law enforcement areas.

A strong majority of respondents held the view that mutual assistance with foreign **competition law** authorities is generally in the public interest. However, support from legal and business interests was generally predicated on the mutual assistance regime having significant safeguards and limitations. Judicial and Attorney General of Canada review was identified by some as desirable, as was consent.

There was general agreement that the full range of compulsory powers under the *Act* should be available to assist foreign authorities. However, a significant minority felt civil matters should be excluded from a mutual assistance regime.

Generally, commentators felt that, where a foreign **competition law** authority is prohibited by its legislation from providing certain categories of **information**, such categories of **information** should be also exempted from **communication** by the Bureau. Reciprocity was generally viewed as a *sine qua non* in this regard.

A number of safeguards were suggested to ensure that **information** communicated to a foreign authority is not used, or communicated to third parties, for purposes unrelated to the enforcement of the foreign **competition law**, or to private plaintiffs in **competition law** proceedings. Commentators also addressed themselves in some detail to other factors that should be considered in deciding whether to enter into a mutual assistance agreement with a particular foreign jurisdiction.

3. The Consultative Panel

The Panel addressed three main issues in its deliberations:

- 1) the general scope of confidentiality for **information** provided to the Director;

- 2) the appropriate confidentiality regime as it relates to domestic matters without an international component; and,
- 3) confidentiality in relation to matters involving assistance between jurisdictions.

General Scope of Protection

Currently, s. 29 of the *Act* imbues specified categories of **information** with confidentiality protection. Its protection does not, for example, cover **information** provided to the Bureau on a voluntary basis. Given the commercial sensitivity of **information** obtained by the Bureau in the administration or enforcement of the *Act* as well as personal privacy interests, the Panel concluded that the *Act* should ensure the confidentiality of all such **information**. Excluded from this protection would be information which is public or where there is consent of parties directly affected.

The Panel found it important that compliance with the new confidentiality regime be ensured. Accordingly, it urged that a specific offence in the *Act* of willful **communication** of **information** contrary to the *Act* be created.

Domestic Matters Communication for "Administration or Enforcement" Purposes

Section 29 of the current *Act* excludes from confidentiality protection communications "for the purposes of the administration or enforcement" of the *Act*. Some members of the Panel agreed with the Bureau's assertion that the Director required some latitude within this rubric to communicate **information** to Canadian marketplace participants to advance an investigation under the *Act*. Others, however, believed that the *Act* should specify which communications should be permitted under "administration or enforcement". Recognizing that some members of the Panel would allow broader discretion to the Director, the Panel's consensus was that the Director should be able to engage in the following communications:

- between the Director and his staff, his agents and the Attorney General of Canada;
- to a court or the Competition Tribunal in the course of enforcement proceedings or disclosure to parties to such proceedings;
- to the target of an investigation for the purpose of settlement negotiations; and,
- where the **communication** is about a record, to the record's apparent author or its recipient(s) or to persons referred to in the record.

Other Authorized Communications

Section 29 of the current *Act* also excludes from confidentiality protection communications to Canadian law enforcement agencies. The Panel reached consensus that the Bureau should be authorized to communicate **information** in the following instances:

- redirecting complaint **information** to agencies that deal with such matters;
- notifying foreign governments pursuant to international agreements or arrangements¹; and,
- giving **information** to a Canadian law enforcement agency.

The Panel's consensus is also that the Bureau should *not* be specifically authorized *under the Act* to communicate **information** obtained pursuant to the enforcement of the *Act* during interventions by the Director in proceedings *under s. 125 or s. 126*.

Matters with a Foreign Component

Safeguards and Public Interest Requirements

The Panel discussed the place of international cooperation in **competition** law enforcement and concluded that the controlled exchange of **information** is justified in today's interdependent world. The Panel endorsed engaging in mutual legal assistance with foreign **competition** law authorities on a reciprocal basis. Specifically, obtaining and sending **information** to a foreign jurisdiction should be authorized pursuant to mutual assistance agreements with foreign governments or **competition** law authorities. Such agreements should be subject to publication and a comment period before coming into force to permit public input on their provisions. To ensure that such assistance is in the Canadian public interest, a list of minimum requirements should be set out in the *Act*:

- (i) Mutual assistance agreements must only be entered into with countries whose **competition** laws are substantially similar to Canada's.
- (ii) Mutual assistance agreements must require reciprocity regarding the scope of assistance that will be provided by the two governments.
- (iii) Mutual assistance agreements must require that the foreign party comply with any conditions imposed on the use to be made of **information** and its return.

Also, where the **communication of information** is proposed in relation to a solely foreign competition law matter, mutual assistance agreements must require this to be approved by the Minister of Justice, who could refuse such assistance if it would be contrary to the Canadian public interest.

When communicating **information** to foreign **competition** law authorities, the Panel concluded that the *Act* should also require that the following safeguards apply:

- (i) **information** sent from Canada would be subject to confidentiality protection in the foreign jurisdiction which is substantially similar to that provided by Canada;
- (ii) **information** sent from Canada would only be used for **competition** law enforcement purposes by the foreign **competition** law authority;
- (iii) applicable rights or privileges would be preserved. For example, Canadian law respecting the use of compelled testimony would be recognized and applied by the receiving country. Another example would be solicitor-client privilege; and,
- (iv) if a confidentiality obligation is violated, the **information** provider will be advised.

The Panel also concluded that there should be sanctions for breaching a confidentiality obligation. Depending on the nature of the breach, these sanctions could include the withdrawal of authority to use the **information** in the foreign jurisdiction and the return of the **information**.

Oversight Mechanisms Canadian Competition Investigations

The Panel considered at length what, if any, oversight mechanisms beyond the safeguards set out above are appropriate to ensure accountability when reliance is placed on mutual assistance agreements for the purpose of advancing a Canadian investigation.

Some members felt that it was crucial that **information** obtained by the Bureau in respect of its own investigation should not be sent to a foreign jurisdiction, even where the above-noted safeguards and public interest requirements have been satisfied, without the approval of a court following a hearing on notice to the **information** provider and target(s) of the investigation. The basic features of such an oversight hearing would be designed so as not to be overly costly and cumbersome. This would ensure accountability of the government. Notice could be delayed until the Bureau determines the investigation would no longer be prejudiced. One suggestion in this regard would be that any hearing before a judge would take place within 30 days of notice with no right of appeal. At the hearing, the judge could order the return of **information** or limitations on its use. The purpose of the judicial hearing would be to ensure that the safeguards in the law have been complied with.

On the other hand, other members felt that even this was too cumbersome a process which could result in unnecessary costs and delays with little gain in terms of protection. These members believed the safeguards and public interest requirements set out above, but not including review by the Minister of Justice, should be sufficient to address adequately the interests of the **information** provider. Review by the Minister of Justice would not be in keeping with similar practices of other Canadian law enforcement agencies.

In the end, the Panel was unable to reach a consensus on whether third party oversight, over and above the safeguards and public interest requirements, was necessary in situations where the Bureau wishes to use a mutual assistance agreement to further a Canadian investigation.

Oversight Mechanisms Solely Foreign Competition Law Matters

One final circumstance covers the treatment of **information** sharing relating to a foreign competition law matter, whether the **information** was obtained as a result of a foreign request or an investigation under the *Act*. It was the Panel's consensus that the Bureau should largely adopt the approach set out in the *Mutual Legal Assistance in Criminal Matters Act (MLACMA)* and should seek judicial authorization to send such **information** to a foreign competition law authority. The notice and judicial review regime described in "Oversight Mechanisms Canadian Competition Investigations" should be applicable for these purposes, *mutatis mutandis*. However, in addition, the Bureau should always give notice that it is seeking such authorization to a party that has been subject to previous formal powers at the request of a foreign competition law authority. Some members of the Panel asserted that notice should also be provided to the target(s) of the investigation, while others felt the process set out in *MLACMA* (notice to providers of **information** only) was adequate.

In addition, it was the Panel's consensus that, even in the absence of a request for **information**, the Bureau should nevertheless be able to seek authorization to send **information** in its possession to a foreign competition law authority. However, this should only be permitted if the foreign jurisdiction is prepared to reciprocate² and only if the **information** is to be communicated to assist in respect of an ongoing foreign investigation. The Bureau should not be permitted to provide **information** which triggers a new foreign investigation.

In authorizing the communication of **information** to a foreign competition law authority, conditions could be imposed at the hearing, including those:

- (i) necessary to give effect to any request;
- (ii) with respect to the preservation and return to Canada of any record or thing seized; and,
- (iii) with respect to the protection of the interests of third parties;
- (iv) providing other protections such as limitations on use.

4. Recommendations

General Scope of Protection

- 1) All **information** obtained by the Bureau in the administration or enforcement of the *Act* should be designated **confidential**. Excluded from this protection would be **information** which is public or where there is consent of parties directly affected.
- 2) A specific offence in the *Act* of willful **communication** of **information** contrary to the *Act* should be created.

Domestic Matters

Communication for "Administration or Enforcement" Purposes

- 3) The Director should further examine which communications should be permitted **under** the rubric of "administration or enforcement". Recognizing that some members of the Panel would allow broader discretion to the Director, the Panel's consensus was that the Director should be able to engage in the following communications:
 - between the Director and his staff, his agents and the Attorney General of Canada;
 - to a court or the **Competition** Tribunal in the course of enforcement proceedings or disclosure to parties to such proceedings;
 - to the target of an investigation for the purpose of settlement negotiations; and,
 - where the **communication** is about a record, to the record's apparent author or its recipient(s) or to persons referred to in the record.

Other Authorized Communications

- 4) The Bureau should be authorized to communicate **information** in the following instances:
 - redirecting complaint **information** to agencies that deal with such matters;
 - notifying foreign governments pursuant to international agreements or arrangements, subject to the confidentiality provisions in the *Act*; and,
 - giving **information** to a Canadian law enforcement agency.
- 5) The Bureau should *not* be specifically authorized **under** the *Act* to communicate **information** obtained pursuant to the enforcement of the *Act* during interventions by the Director in proceedings under s. 125 or s. 126.

Matters with a Foreign Component

Safeguards and Public Interest Requirements

6) Obtaining and sending **information** to a foreign jurisdiction, where it is willing to reciprocate, should be authorized pursuant to mutual assistance agreements with foreign governments or competition law authorities. Such agreements should be subject to publication and a comment period before coming into force. To ensure that such assistance is in the Canadian public interest, a list of minimum requirements should be set out in the *Act* :

- (i) mutual assistance agreements must only be entered into with countries whose **competition** laws are substantially similar to Canada's.
- (ii) Mutual assistance agreements must require reciprocity regarding the scope of assistance that will be provided by the two governments.
- (iii) Mutual assistance agreements must require that the foreign party comply with any conditions imposed on the use to be made of **information** and its return.

Where the **communication** of **information** is proposed in relation to a solely foreign competition law matter, mutual assistance agreements must require this to be approved by the Minister of Justice, who could refuse such assistance if it would be contrary to the Canadian public interest.

7) When communicating **information** to foreign **competition** law authorities, the *Act* should also require the following safeguards to apply:

- (i) **information** sent from Canada would be subject to confidentiality protection in the foreign jurisdiction which is substantially similar to that provided by Canada;
- (ii) **information** sent from Canada would only be used for **competition** law enforcement purposes by the foreign **competition** law authority;
- (iii) applicable rights or privileges would be preserved. For example, Canadian law respecting the use of compelled testimony would be recognized and applied by the receiving country. Another example would be solicitor-client privilege; and,
- (iv) if confidentiality obligation violated, **information** provider to be advised.

8) There should be sanctions for breaching a confidentiality obligation.

Oversight Mechanisms Canadian or Joint Competition Investigations

9) Having regard to the divergent views, the Director should further examine what, if any, oversight mechanisms, over and above the safeguards and public interest requirements (except review by the Minister of Justice), are appropriate when **communication** is proposed for the purpose of advancing a Canadian investigation.

Oversight Mechanisms Solely Foreign Competition Law Matters

10) The Bureau should largely adopt the approach set out in the *Mutual Legal Assistance in Criminal Matters Act (MLACMA)* and should seek judicial authorization to send **confidential information** to

a foreign **competition** law authority, with or without a request.

11) Applications for authorization to communicate **information** to a foreign **competition** law authority should be on notice to the **information** provider unless prejudicial to an ongoing investigation. In the latter case, the Bureau should give notice as soon as practicable after the investigation would no longer be prejudiced or such sooner period as the court specifies. However, the Bureau should always give notice to a party that has been previously subject to formal powers at the request of a foreign **competition** law authority.

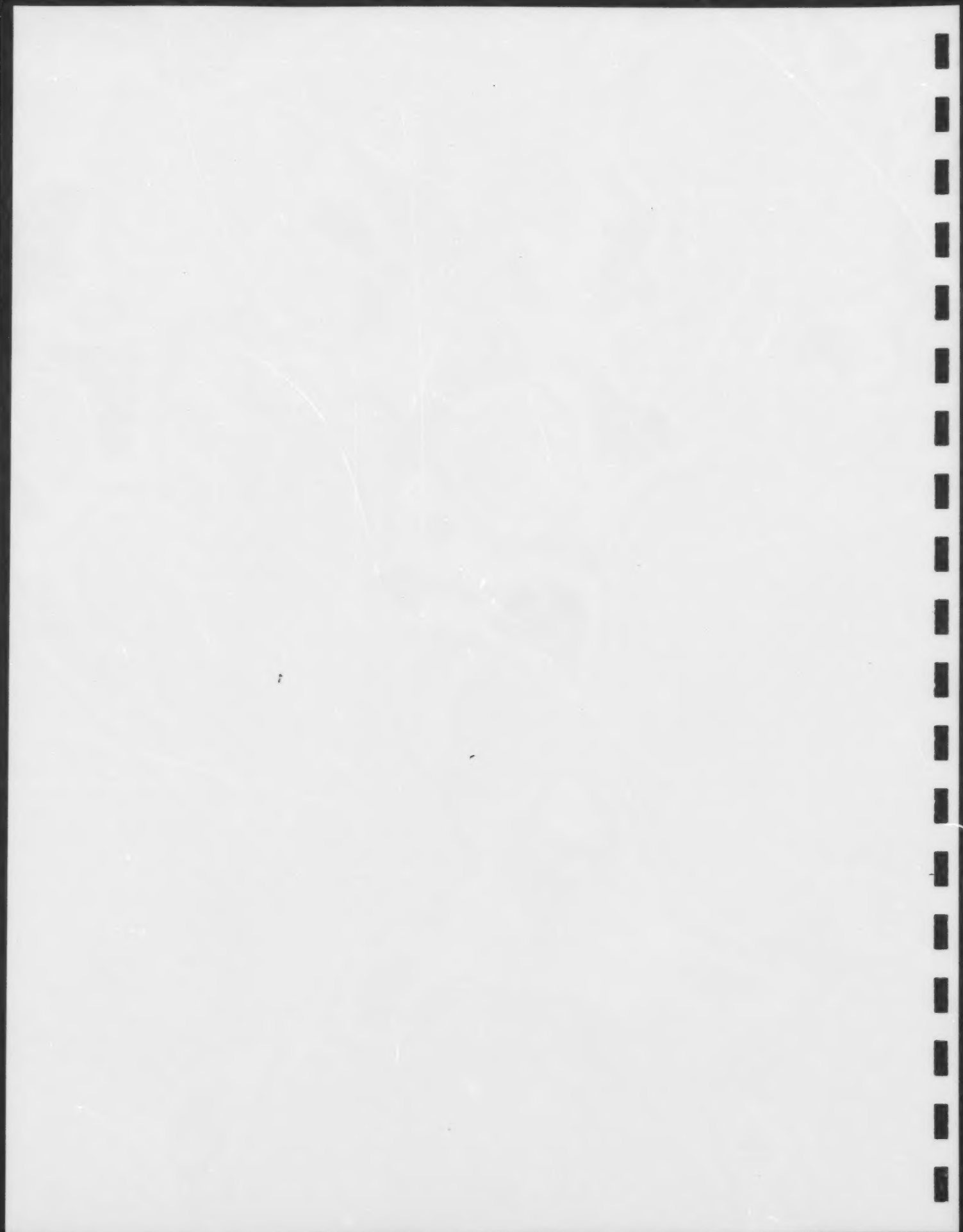
12) In authorizing the **communication** of **information** to a foreign **competition** law authority, conditions could be imposed at the hearing, including those:

- (i) necessary to give effect to any request;
- (ii) with respect to the preservation and return to Canada of any record or thing seized;
- (iii) with respect to the protection of the interests of third parties; and,
- (iv) providing other protections such as limitations on use.

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Canada

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SCHEDULE B
MEMORANDUM OF UNDERSTANDING

MEMORANDUM OF UNDERSTANDING

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

- AND -

ONTARIO SECURITIES COMMISSION

COMMISSION DES VALEURS MOBILIERES DU QUEBEC

BRITISH COLUMBIA SECURITIES COMMISSION

JANUARY 7, 1988

MEMORANDUM OF UNDERSTANDING

The United States Securities and Exchange Commission, the Ontario Securities Commission, the Commission des valeurs mobilières du Québec and the British Columbia Securities Commission, recognizing the increasing international activity in securities markets and the corresponding need for mutual cooperation in matters relating to the administration and enforcement of United States and Canadian securities laws, have reached the following understanding with respect to requests for assistance as set out herein made between the United States Securities and Exchange Commission and a Canadian securities regulatory authority:

Article 1: Definitions

1. For the purposes of this Memorandum of Understanding:

(a) "Authority" means:

- (i) the Securities and Exchange Commission of the United States; or
- (ii) the Ontario Securities Commission, the Commission des Valeurs Mobilières du Québec, the British Columbia Securities Commission or any other Canadian securities regulatory

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authority which becomes a party to this Memorandum of Understanding in the manner set out in Article 12.

- (b) "requested Authority" means:
 - (i) where the requesting Authority is the United States Securities and Exchange Commission, the Canadian securities regulatory authority to which the request under this Memorandum of Understanding is made; or
 - (ii) where the requesting Authority is a Canadian securities regulatory authority, the United States Securities and Exchange Commission.
- (c) "requesting Authority" means an Authority making a request under this Memorandum of Understanding.
- (d) "person" means a natural person, unincorporated association, partnership, body corporate, government, political subdivision, agency, or instrumentality of a government.
- (e) "issuer" means a person who issues or proposes to issue any security.

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- (f) "investment businesses" means investment advisers, investment advisory services, investment companies, other collective investment undertakings, investment banks, brokers, dealers, and equivalent entities.
- (g) "securities processing businesses" means clearing corporations or securities transfer agents.
- (h) "laws or regulations" means the laws, regulations and regulatory policies applicable in the jurisdictions of the Authorities concerning securities regulation including, without limitation:
 - (i) insider trading;
 - (ii) misrepresentation or the use of fraudulent, deceptive, or manipulative practices in connection with the offer, purchase or sale of any security;
 - (iii) the duties of persons to comply with periodic reporting requirements or requirements relating to changes in corporate control;
 - (iv) the duties of persons, issuers or investment businesses to make full and fair disclosure of information relevant to investors;

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- (v) the duties of investment businesses and securities processing businesses pertaining to both their financial, operational or other requirements and their duties of fair dealing in the offer and sale of securities and the execution of transactions; and
- (vi) the financial and other qualifications of those engaged in, or in control of, issuers, investment businesses or securities processing businesses.

Article 2: Scope of Assistance

1. The Authorities will provide the fullest mutual assistance, as contemplated by this Memorandum of Understanding. Such assistance will be provided to facilitate the performance of securities market oversight functions and the conduct of investigations, litigation or prosecution in cases where information located within the jurisdiction of the requested Authority is needed to determine whether, or prove that, the laws or regulations of the requesting Authority may have been violated.

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2. Assistance available under this Memorandum of Understanding includes but is not limited to:

- (a) providing access to information in the files of the requested Authority;
- (b) taking the evidence of persons; and
- (c) obtaining documents from persons.

3. The Authorities recognize that they may not in all circumstances possess the legal authority to provide the assistance contemplated in this Memorandum of Understanding. Subject to such limitations of legal authority, the Authorities will use all reasonable efforts to obtain the necessary authorization to provide the assistance described in this Memorandum of Understanding.

Article-3: General Principles

1. This Memorandum of Understanding sets forth a statement of intent of the Authorities regarding the exchange of information between the Authorities.

2. The execution of this Memorandum of Understanding does not prohibit any Authority from taking measures other than as provided herein to obtain information, evidence or documents located in the jurisdiction of another Authority or in the possession or under the control of a national of another Authority necessary to ensure compliance with or enforce the laws or regulations of its jurisdiction, provided that such Authority:

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- (i) utilizes moderation and restraint in taking such additional measures;
- (ii) where the information is located within the territory of the other Authority, makes a request to the other Authority pursuant to this Memorandum, or otherwise, prior to taking such other measures;
- (iii) notifies the other Authority before using measures not contemplated by this Memorandum of Understanding; and
- (iv) consults, if so requested, concerning how such measures may affect the interests of the other Authority and its government.

Notwithstanding these restrictions:

- (a) a requesting Authority may communicate with any person in the jurisdiction of the requested Authority who voluntarily agrees to provide the information or documents requested; and
- (b) requests for information which is available from any public source in the jurisdiction of the requested Authority may be communicated on an informal basis without compliance with the terms of this Memorandum of Understanding.

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3. The provisions of this Memorandum of Understanding will not give rise to a right, directly or indirectly, on the part of any person, other than the Authorities, to obtain, suppress or exclude any information or to challenge the execution of a request for assistance under this Memorandum of Understanding.

4. Assistance under this Memorandum of Understanding may be denied by the requested Authority on grounds of public interest.

Article 4: Requests for Assistance

1. Requests for assistance must be made in writing and addressed to the requested Authority's contact officer listed in Appendix A.

2. The request for assistance will specify the following:

- (a) a general description of the documents, information and testimony of persons sought by the requesting Authority;
- (b) a general description of both the matter which is the subject of the request and the purpose for which the information is sought;
- (c) the persons believed by the requesting Authority to possess the information sought, or the places where such information may be obtained, if the requesting Authority is knowledgeable thereof;

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- (d) the legal provisions pertaining to the matter which is the subject of the request; and
- (e) the desired time period for the reply.

3. Requests for assistance may be denied where the request is not in accordance with the provisions set forth in this Memorandum of Understanding.

4. In the event of urgency, requests for assistance and replies to such requests will be effected by summary procedures or by means of communication other than the exchange of letters, provided that all such communications are confirmed in the manner prescribed in this Article.

Article 5: Execution of Requests

1. In making a request for assistance the Requesting Authority may designate the persons whose testimony it wishes to be taken.

2. The testimony of persons involved, directly or indirectly, in the activities underlying the request or holding information which may assist in carrying out the request will be taken, and the production of other evidence will be required, by the requested Authority or any other party or parties that it designates.

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3. The testimony of persons will be taken in the same manner and to the same extent as in investigations or other proceedings in the jurisdiction of the requested Authority. Notwithstanding any other provision of this Memorandum of Understanding, any person giving testimony as a result of a request made under this Memorandum of Understanding will be entitled to all of the rights and protections of the laws of the jurisdiction of the requested Authority. Assertions regarding other rights and privileges arising exclusively pursuant to the law of the jurisdiction of the requesting Authority shall be preserved for consideration by the courts in the jurisdiction of the requesting Authority.

4. Access to information held in the files of the requested Authority will be provided upon request of the requesting Authority.

5. When requested by the requesting Authority, testimony will be taken under oath and a transcript will be made. In addition, a representative of the requesting Authority may be present at the taking of testimony and, subject to approval by the requested Authority and to paragraph 6, may prescribe specific questions to be asked of any witness or otherwise participate in the examination of any witness.

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6. Subject to the following conditions, a requested Authority may grant a request made by the requesting Authority that a person or persons designated by the requesting Authority be permitted to conduct the interrogation of any person:

- (a) the requesting Authority must specify the reasons for this request.
- (b) the request may be granted or denied by the requested Authority in its discretion. The requested Authority may impose such conditions on the participation of the requesting Authority as it deems appropriate.
- (c) if the request is granted and the laws of the jurisdiction of the requesting Authority require the opportunity for counsel to the witness or any party to the proceeding, his counsel, or both, to pose questions to the witness, such participation will be permitted; and

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- (d) if the request is denied, the Authorities agree to consult pursuant to Article 8 concerning the reasons for the denial and the circumstances under which the request might be granted.

Article 6: Permissible Use of Information

1. The requesting Authority may use the information furnished solely:

- (a) for the purposes stated in the request with respect to ensuring compliance with or enforcement of the laws and regulations of the requesting Authority including the legal provisions specified in the request and related provisions; and
- (b) for purposes within the general framework of the use stated in the request including conducting a civil or administrative enforcement proceeding, assisting in a criminal prosecution, assisting in a self-regulatory enforcement proceeding, or conducting any investigation related thereto for any general charge applicable to the violation of the provisions specified in the request.

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2. The requesting Authority will not use the information furnished for any purpose other than those stated in paragraph 1 of this article, unless it has first informed the requested Authority of its intention and the requested Authority has not objected to such intended use of the information. If the requested Authority opposes such use, the information may be used only under the conditions imposed by the requested Authority. If use of the information is opposed by the requested Authority, the Authorities agree to consult pursuant to Article 8 concerning the reasons for the refusal and the circumstances under which use of the information might otherwise be allowed.

Article 7: Confidentiality of Requests

1. Each Authority will keep requests made under this Memorandum of Understanding, the contents of such requests, information gathered in response to requests, and any other matters arising during the operation of this Memorandum of Understanding, including consultations between the Authorities, confidential, to the extent permitted by law, except for disclosures which are absolutely necessary to carry out the request, provided that such confidentiality may be waived by the mutual agreement of the requesting Authority and the requested Authority.

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2. The Authorities will keep confidential, to the extent permitted by law, any information provided pursuant to this Memorandum of Understanding subject to the terms of this paragraph, unless it is disclosed in furtherance of the purpose for which it was requested under Article 6.

3. Except as contemplated by Article 6, the requesting Authority will not offer the information to, and shall use its best efforts to ensure that it is not obtained by, any other person. Unless otherwise agreed, if such information is obtained by any other person, the requesting Authority will use its best efforts to ensure that such information will not be used by that person in any way that involves disclosure to any other person.

4. The requesting Authority will notify the requested Authority of any legally enforceable demand for information prior to complying with the demand and will assert such appropriate legal exemptions or privileges with respect to such information as may be available.

5. As soon as the requesting Authority has terminated the matter for which assistance has been requested under this Memorandum of Understanding, it will return to the requested Authority, to the extent permitted by law, all documents and copies thereof not already disclosed in proceedings referred to in Article 6 and other material

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disclosing the contents of such documents, other than material which is generated as part of the deliberative or internal analytical process of the requesting Authority.

6. Any document or any other material provided by an Authority in response to a request under this Memorandum of Understanding and any other material disclosing its content, other than material which is generated as part of the deliberative or internal analytical process of the requesting Authority, will not become the property of the requesting Authority, and must be redelivered to the requested Authority without delay on demand to the extent permitted by the law of the requesting Authority; provided that such demand may be made only if the requested Authority has reason to believe that the information has been or is likely to be disclosed or used otherwise than as contemplated by Article 6 above.

Article 8: Disputes and Consultations

1. In any case of dispute over the meaning of any term used in this Memorandum of Understanding, the parties will define the terms herein in accordance with the relevant laws of the jurisdiction of the requesting Authority.

2. The Authorities will engage in consultations with respect to this Memorandum of Understanding with a view to improving its operation and resolving any matters which may arise. In particular, the Authorities will consult upon request in the event of:

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- (a) a refusal by one Authority to comply with a request for information on the grounds set forth in paragraph 4 of Article 3; or
- (b) a change in market or business conditions, or in the legislation governing the matters set forth in paragraph 1(h) of Article 1, or any other difficulty which makes it necessary or appropriate to amend or extend this Memorandum of Understanding in order to achieve its purposes.

3. The Authorities may agree on such practical measures as may be necessary to facilitate the implementation of this Memorandum of Understanding.

4. Any of the conditions of this Memorandum of Understanding may be amended, relaxed or waived by mutual agreement.

Article 9: Unsolicited Assistance

1. To the extent permitted by the laws and regulations of its jurisdiction, each Authority will use reasonable efforts to provide the other Authority with any information it discovers which gives rise to a suspicion of a breach, or anticipated breach, of the laws or regulations of the other Authority.

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Article 10: Costs of Investigation

1. If it appears that responding to a request for assistance under this Memorandum of Understanding will involve substantial costs being incurred by the requested Authority, the requested Authority and the requesting Authority will establish a cost sharing arrangement before continuing to respond to such request for assistance.

Article 11: International Law

1. The execution of this Memorandum of Understanding will not prejudice the respective positions of the Authorities and their governments concerning the principles of international law applicable to procedures for obtaining information located in another jurisdiction as contemplated in Article 3.

2. The Authorities acknowledge that when the treaty between the governments of Canada and the United States of America on Mutual Legal Assistance in Criminal Matters is duly implemented and ratified it, in addition to this Memorandum of Understanding, will constitute a framework of principles and procedures for investigating and obtaining information concerning certain kinds of securities law offences.

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Article 12: Execution

1. This Memorandum of Understanding will be effective from the date of its execution by the United States Securities and Exchange Commission, the Ontario Securities Commission, the Commission des valeurs mobilières du Québec and the British Columbia Securities Commission.

2. Any Canadian securities regulatory authority may become a party to this Memorandum of Understanding by executing a counterpart thereof together with the Securities and Exchange Commission and providing notice of such execution to the other Canadian securities regulatory authorities which are parties to this Memorandum of Understanding.

Article 13: Termination

1. This Memorandum of Understanding may be terminated as to any Authority by that Authority giving 30 days notice to the other Authorities that this Memorandum of Understanding is no longer in effect as to the terminating Authority's area of competence. If any Authority gives such notice, this Memorandum of Understanding will continue to have effect with respect to all requests for assistance which are

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made before the effective date of notification until the requesting Authority terminates the matter for which assistance was requested.

DATED this 7th day of January, 1988

United States Securities
and Exchange Commission

Ontario Securities
Commission

by David S. Ruder

D. S. Ruder
Chairman

by S. W. Beck

S. W. Beck, Q.C.
Chairman

British Columbia
Securities Commission

Commission des valeurs
mobilières du Québec

by D. M. Hyndman

D. M. Hyndman
Chairman

by P. Guy

P. Guy
President



SCHEDULE C
CANADA-UNITED STATES CONVENTION ACT

United States Convention

The Canada-United States Tax Convention Act, 1984, S.C. 1984, c. 20, promulgated the Convention between the two countries, which appeared as Schedule I to the Act, as amended by the Protocols set out in Schedules II and III. The changes brought about by the Protocols have been recorded in the relevant articles of the Convention, but readers should refer to the text of the Protocols (beginning at page 17,201) for the effective dates of these changes. The Act received assent on June 28, 1984 and the Convention entered into force on the exchange of instruments of ratification on 16 August 1984.

Note: Under paragraphs 4 and 5 of Article XXX, certain provisions of the 1942 Convention may be applicable for 1977.

Short title

1. This Act may be cited as the *Canada-United States Tax Convention Act, 1984*.

Definition of "Convention"

2.

In this Act "Convention" means the Convention entered into between the Government of Canada and the Government of the United States, set out in Schedule 1, as amended by the Protocols set out in Schedules II and III.

Convention approved

3.

- (1) The Convention is approved and declared to have the force of law in Canada during such period as, by its terms, the Convention is in force.

Inconsistent laws

- (2) In the event of any inconsistency between the provisions of this Act, or the Convention, and the provisions of any other law, the provisions of this Act and the Convention prevail to the extent of the inconsistency.

Regulations

- (3) The Minister of National Revenue may make such regulations as are necessary for the purpose of carrying out the Convention or for giving effect to any of the provisions thereof.

Promulgation of dates

4.

Notice of the day the Convention comes into force and of the day it ceases to be effective shall be given by proclamation of the Governor in Council published in the *Canada Gazette*.

* Proclamation giving notice of the coming into force of this Convention was published in the *Canada Gazette*, Part II, December 12, 1984.

TAX AGREEMENTS AND CONVENTIONS

Schedule I

Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital

Canada and the United States of America, desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, have agreed as follows:

Note: For amendments made by the Third Protocol please refer to the note at the end of each relevant Article.

Article I

Personal Scope

This Convention is generally applicable to persons who are residents of one or both of the Contracting States.

Article II

Taxes Covered

1. This Convention shall apply to taxes on income and on capital imposed on behalf of each Contracting State, irrespective of the manner in which they are levied.
2. The existing taxes to which the Convention shall apply are:
 - (a) In the case of Canada, the taxes imposed by the Government of Canada under Parts I, XIII and XIV of the *Income Tax Act*; and
 - (b) In the case of the United States, the Federal income taxes imposed by the Internal Revenue Code.
3. The Convention shall apply also to:
 - (a) Any identical or substantially similar taxes on income; and
 - (b) Taxes on capitalwhich are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes.
4. Notwithstanding the provisions of paragraphs 2(b) and 3, the Convention shall apply to:
 - (a) The United States accumulated earnings tax and personal holding company tax, to the extent, and only to the extent, necessary to implement the provisions of paragraphs 5 and 8 of Article X (Dividends);
 - (b) The United States excise taxes imposed with respect to private foundations, to the extent, and only to the extent, necessary to implement the provisions of paragraph 4 of Article XXI (Exempt Organizations); and
 - (c) The United States social security taxes, to the extent, and only to the extent, necessary to implement the provisions of paragraph 4 of Article XXIX (Miscellaneous Rules).

UNITED STATES CONVENTION

Note: Paragraphs 2 to 4 shall be deleted when the Third Protocol is ratified, and be replaced by the provisions of Article 1 of that Protocol.

Article III

General Definitions

1. For the purposes of this Convention, unless the context otherwise requires:

- (a) When used in a geographical sense, the term "Canada" means the territory of Canada, including any area beyond the territorial seas of Canada which, in accordance with international law and the laws of Canada, is an area within which Canada may exercise rights with respect to the seabed and subsoil and their natural resources;
- (b) The term "United States" means:
 - (i) The United States of America, but does not include Puerto Rico, the Virgin Islands, Guam or any other United States possession or territory; and
 - (ii) When used in a geographical sense, such term also includes any area beyond the territorial seas of the United States which, in accordance with international law and the laws of the United States, is an area within which the United States may exercise rights with respect to the seabed and subsoil and their natural resources;
- (c) The term "Canadian tax" means the Canadian taxes referred to in paragraphs 2(a) and 3(a) of Article II (Taxes Covered);
- (d) The term "United States tax" means the United States taxes referred to in paragraphs 2(b) and 3(a) of Article II (Taxes Covered);
- (e) The term "person" includes an individual, an estate, a trust, a company and any other body of persons;

[The next page is 17,103]

UNITED STATES CONVENTION

- (f) The term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes;
- (g) The term "competent authority" means:
 - (i) In the case of Canada, the Minister of National Revenue or his authorized representative; and
 - (ii) In the case of the United States, the Secretary of the Treasury or his delegate;
- [(h) The term "international traffic" means any voyage of a ship or aircraft to transport passengers or property except where the principal purpose of the voyage is to transport passengers or property between places within a Contracting State;]

The foregoing subparagraph was deleted by Article I of the First Protocol and replaced by the following:

- (h) The term "international traffic" with reference to a resident of a Contracting State means any voyage of a ship or aircraft to transport passengers or property (whether or not operated or used by that resident) except where the principal purpose of the voyage is to transport passengers or property between places within the other Contracting State;
 - (i) The term "State" means any national State, whether or not a Contracting State; and
 - (j) The term "the 1942 Convention" means the Convention and Protocol between Canada and the United States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion in the case of Income Taxes signed at Washington on March 4, 1942 as amended by the Convention signed at Ottawa on June 12, 1950, by the Convention signed at Ottawa on August 8, 1956 and by the Supplementary Convention signed at Washington on October 25, 1966.
2. As regards the application of the Convention by a Contracting State any term not defined therein shall, unless the context otherwise requires and subject to the provisions of Article XXVI (Mutual Agreement Procedure), have the meaning which it has under the law of that State concerning the taxes to which the Convention applies.

Note: Subparagraphs (c) and (d) are replaced by Article 2 of the Third Protocol.

Article IV

Residence

1. For the purposes of this convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation or any other criterion of a similar nature, but in the case of an estate or trust, only to the extent that income derived by such estate or trust is liable to tax in that State, either in its hands or in the hands of its beneficiaries.

(This paragraph was judicially considered in *Crown Forest Industries v. The Queen*, 92 DTC 6305 (F.C.T.D.); aff'd 94 DTC 6107 (C.A.); rev'd 95 DTC 5389 (S.C.C.). The case digest will be found under Article IV in the commentary section of the United States Convention, which appears in Volume III.)

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2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:
 - (a) He shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him; if he has a permanent home available to him in both States or in neither State, he shall be deemed to be a resident of the Contracting State with which his personal and economic relations are closer (centre of vital interests);
 - (b) If the Contracting State in which he has his centre of vital interests cannot be determined, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode;
 - (c) If he has an habitual abode in both States or in neither State, he shall be deemed to be a resident of the Contracting State of which he is a citizen; and
 - (d) If he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.
3. Where by reason of the provisions of paragraph 1 a company is a resident of both Contracting States, then if it was created under the laws in force in a Contracting State, it shall be deemed to be a resident of that State.
4. Where by reason of the provisions of paragraph 1 an estate, trust or other person (other than an individual or a company) is a resident of both Contracting States, the competent authorities of the States shall by mutual agreement endeavour to settle the question and to determine the mode of application of the Convention to such person.
5. Notwithstanding the provisions of the preceding paragraphs, an individual shall be deemed to be a resident of a Contracting State if:
 - (a) The individual is an employee of that State or of a political subdivision, local authority or instrumentality thereof rendering services in the discharge of functions of a governmental nature in the other Contracting State or in a third State; and
 - (b) The individual is subjected in the first-mentioned State to similar obligations in respect of taxes on income as are residents of the first-mentioned State.

The spouse and dependent children residing with such an individual and meeting the requirements of subparagraph (b) above shall also be deemed to be residents of the first-mentioned State.

Note: Paragraphs 1 and 3 are amended by Article 3 of the Third Protocol.

Article V

Permanent Establishment

1. For the purposes of this convention, the term "permanent establishment" means a fixed place of business through which the business of a Contracting State is wholly or partly carried on.
2. The term "permanent establishment" shall include especially:
 - (a) A place of management;
 - (b) A branch;

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- (c) An office;
 - (d) A factory;
 - (e) A workshop; and
 - (f) A mine, an oil or gas well, a quarry or other place of extraction of natural resources.
3. A building site or construction or installation project constitutes a permanent establishment if, but only if, it lasts more than 12 months.
- [4. *The use of a drilling rig or ship in a Contracting State to explore for or exploit natural resources constitutes a permanent establishment if, but only if, such use is for more than 3 months in any twelve-month period.*]

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The foregoing paragraph was deleted by Article II of the First Protocol and replaced by the following:

4. The use of an installation or drilling rig or ship in a Contracting State to explore for or exploit natural resources constitutes a permanent establishment if, but only if, such use is for more than three months in any twelve-month period.
5. A person acting in a Contracting State on behalf of a resident of the other Contracting State—other than an agent of an independent status to whom paragraph 7 applies—shall be deemed to be a permanent establishment in the first-mentioned State if such person has, and habitually exercises in that State, an authority to conclude contracts in the name of the resident.
6. Notwithstanding the provisions of paragraphs 1, 2 and 5, the term "permanent establishment" shall be deemed not to include a fixed place of business used solely for, or a person referred to in paragraph 5 engaged solely in, one or more of the following activities:
 - (a) The use of facilities for the purpose of storage, display or delivery of goods or merchandise belonging to the resident;
 - (b) The maintenance of a stock of goods or merchandise belonging to the resident for the purpose of storage, display or delivery;
 - (c) The maintenance of a stock of goods or merchandise belonging to the resident for the purpose of processing by another person;
 - (d) The purchase of goods or merchandise, or the collection of information, for the resident; and
 - (e) Advertising, the supply of information, scientific research or similar activities which have a preparatory or auxiliary character, for the resident.
7. A resident of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because such resident carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.
8. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not constitute either company a permanent establishment of the other.
9. For the purposes of the Convention, the provisions of this Article shall be applied in determining whether any person has a permanent establishment in any State.

This article was judicially considered in *Fowler v. M.N.R.*, 90 DTC 1834 (T.C.C.). The case digest will be found under article 5 in the commentary section of the United States Convention, which appears in Volume III.

This article was judicially considered in *Shahmoon v. M.N.R.*, 75 DTC 275 (T.R.B.). The case digest can be found under article 5 in the commentary section of the United States Convention in Volume III.

Article VI

Income From Real Property

- [1. *Income derived by a resident of a Contracting State from real property (including*

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income from agriculture or forestry) situated in the other Contracting State may be taxed in that other State.

- 2. For the purposes of this Convention, the term "real property" shall have the meaning which it has under the taxation laws of the Contracting State in which the property in question is situated and shall include any option or similar right in respect thereof. The term shall in any case include usufruct of real property and rights to explore for or to exploit mineral deposits, sources and other natural resources; ships and aircraft shall not be regarded as real property.*
- 3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting or use in any other form of real property and to income from the alienation of such property.]*

Article VI was deleted by Article III of the First Protocol and replaced by the following:

1. Income derived by a resident of a Contracting State from real property (including income from agriculture, forestry or other natural resources) situated in the other Contracting State may be taxed in that other State.
2. For the purposes of this Convention, the term "real property" shall have the meaning which it has under the taxation laws of the Contracting State in which the property in question is situated and shall include any option or similar right in respect thereof. The term shall in any case include usufruct of real property, rights to explore for or to exploit mineral deposits, sources and other natural resources and rights to amounts computed by reference to the amount or value or production from such resources; ships and aircraft shall not be regarded as real property.
3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting or use in any other form of real property and to income from the alienation of such property.

Article VII

Business Profits

1. The business profits of a resident of a Contracting State shall be taxable only in that State unless the resident carries on business in the other Contracting State through a permanent establishment situated therein. If the resident carries on, or has carried on, business as aforesaid, the business profits of the resident may be taxed in the other State but only so much of them as is attributable to that permanent establishment.
2. Subject to the provisions of paragraph 3, where a resident of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the business profits which it might be expected to make if it were a distinct and separate person engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the resident and with any other person related to the resident (within the meaning of paragraph 2 of Article IX (Related Persons)).
3. In determining the business profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment

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is situated or elsewhere. Nothing in this paragraph shall require a Contracting State to allow the deduction of any expenditure which, by reason of its nature, is not generally allowed as a deduction under the taxation laws of that State.

4. No business profits shall be attributed to a permanent establishment of a resident of a Contracting State by reason of the use thereof for either the mere purchase of goods or merchandise or the mere provision of executive, managerial or administrative facilities or services for such resident.
5. For the purposes of the preceding paragraphs, the profits to be attributed to a permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.
6. Where business profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.
7. For the purposes of the Convention, the business profits attributable to a permanent establishment shall include only those profits derived from the assets or activities of the permanent establishment.

This article was judicially considered in *Fowler v. M.N.R.*, 90 DTC 1834 (T.C.C.). The case digest will be found under article 7 in the commentary section of the United States Convention, which appears in Volume III.

Article VIII

Transportation

- [1. Notwithstanding the provisions of Article VII (Business Profits) and XIII (Gains), profits derived by a resident of a Contracting State from the operation of ships or aircraft in international traffic, and gains derived by a resident of a Contracting State from the alienation of ships or aircraft used principally in international traffic, shall be exempt from tax in the other Contracting State.]

The foregoing paragraph was deleted by Article IV of the First Protocol and replaced by the following:

1. Notwithstanding the provisions of Articles VII (Business Profits), XII (Royalties) and XIII (Gains), profits derived by a resident of a Contracting State from the operation of ships or aircraft in international traffic, and gains derived by a resident of a Contracting State from the alienation of ships, aircraft or containers (including trailers and related equipment for the transport of containers) used principally in international traffic, shall be exempt from tax in the other Contracting State.
2. For the purposes of this Convention, profits derived by a resident of a Contracting State from the operation of ships or aircraft in international traffic include profits from:
 - (a) The rental of ships or aircraft operated in international traffic;
 - (b) The use, maintenance or rental of containers (including trailers and related equipment for the transport of containers) used in international traffic; and
 - (c) The rental of ships, aircraft or containers (including trailers and related equipment for the transport of containers) provided that such profits are incidental to profits referred to in paragraph 1. 2(a) or 2(b).
3. Notwithstanding the provisions of Article VII (Business Profits), profits derived

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by a resident of a Contracting State from a voyage of a ship where the principal purpose of the voyage is to transport passengers or property between places in the other Contracting State may be taxed in that other State.

4. Notwithstanding the provisions of Articles VII (Business Profits) and XII (Royalties), profits of a resident of a Contracting State engaged in the operation of motor vehicles or a railway as a common carrier or a contract carrier derived from:

- (a) The transportation of passengers or property between a point outside the other Contracting State and any other point; or
- (b) The rental of motor vehicles (including trailers) or railway rolling stock, or the use, maintenance or rental of containers (including trailers and related equipment for the transport of containers) used

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to transport passengers or property between a point outside the other Contracting State and any other point

shall be exempt from tax in that other Contracting State.

5. The provisions of paragraphs 1, 3 and 4 shall also apply to profits or gains referred to in those paragraphs derived by a resident of a Contracting State from the participation in a pool, a joint business or an international operating agency.
6. Notwithstanding the provisions of Article XII (Royalties), profits derived by a resident of a Contracting State from the use, maintenance or rental of railway rolling stock, motor vehicles, trailers or containers (including trailers and related equipment for the transport of containers) used in the other Contracting State for a period or periods not expected to exceed in the aggregate 183 days in any twelve-month period shall be exempt from tax in the other Contracting State except to the extent that such profits are attributable to a permanent establishment in the other State and liable to tax in the other State by reason of Article VII (Business Profits).

Article IX

Related Persons

1. Where a person in a Contracting State and a person in the other Contracting State are related and where the arrangements between them differ from those which would be made between unrelated persons, each State may adjust the amount of the income, loss or tax payable to reflect the income, deductions, credits or allowances which would, but for those arrangements, have been taken into account in computing such income, loss or tax.
2. For the purposes of this Article, a person shall be deemed to be related to another person if either person participates directly or indirectly in the management or control of the other, or if any third person or persons participate directly or indirectly in the management or control of both.
3. Where an adjustment is made or to be made by a Contracting State in accordance with paragraph 1, the other Contracting State shall (notwithstanding any time or procedural limitations in the domestic law of that other State) make a corresponding adjustment to the income, loss or tax of the related person in that other State if:
 - (a) It agrees with the first-mentioned adjustment; and
 - (b) Within six years from the end of the taxable year to which the first-mentioned adjustment relates, the competent authority of the other State has been notified of the first-mentioned adjustment.
4. In the event that the notification referred to in paragraph 3 is not given within the time period referred to therein, and if the person to whom the first-mentioned adjustment relates has not received, at least six months prior to the expiration of such time period, notification of such adjustment from the Contracting State which has made or is to make such adjustment that State shall, notwithstanding the provisions of paragraph 1, not make the first-mentioned adjustment to the extent that such adjustment would give rise to double taxation.
5. The provisions of paragraphs 3 and 4 shall not apply in the case of fraud, willful default or neglect or gross negligence.

Note: Paragraphs 3 and 4 are replaced by Article 4 of the Third Protocol.

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Article X

Dividends

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.
2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State; but if a resident of the other Contracting State is the beneficial owner of such dividends, the tax so charged shall not exceed:

(a) 10 per cent of the gross amount of the dividends if the beneficial owner is a company which owns at least 10 per cent of the voting stock of the company paying the dividends;

(b) 15 per cent of the gross amount of the dividends in all other cases.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term "dividends" as used in this Article means income from shares or other rights, not being debt-claims, participating in profits, as well as income subjected to the same taxation treatment as income from shares by the taxation laws of the State of which the company making the distribution is a resident.
4. The provisions of paragraph 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article VII (Business Profits) or Article XIV (Independent Personal Services), as the case may be, shall apply.
5. Where a company is a resident of a Contracting State, the other Contracting State may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of the other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other State, nor subject the company's undistributed profits to a tax, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.
6. Nothing in this Convention shall be construed as preventing a Contracting State from imposing a tax on the earnings of a company attributable to permanent establishments in that State, in addition to the tax which would be chargeable on the earnings of a company which is a resident of that State, provided that any additional tax so imposed shall not exceed 10 per cent of the amount of such earnings which have not been subjected to such additional tax in previous taxation years.

For the purposes of this paragraph, the term "earnings" means the amount by which the business profits attributable to permanent establishments in a Contracting State (including gains from the alienation of property forming part of the business property of such permanent establishments) in a year and previous years exceeds the sum of:

- (a) Business losses attributable to such permanent establishments (including

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losses from the alienation of property forming part of the business property of such permanent establishments) in such year and previous years:

- (b) All taxes, other than the additional tax referred to in this paragraph, imposed on such profits in that State;
 - (c) The profits reinvested in that State, provided that where that State is Canada such amount shall be determined in accordance with the existing provisions of the law of Canada regarding the computation of the allowance in respect of investment in property in Canada, and any subsequent modification of those provisions which shall not affect the general principle hereof; and
 - (d) Five hundred thousand Canadian dollars (\$500,000) or its equivalent in United States currency, less any amounts deducted by the company, or by an associated company with respect to the same or a similar business, under this subparagraph (d); for the purposes of this subparagraph (d) a company is associated with another company if one company directly or indirectly controls the other, or both companies are directly or indirectly controlled by the same person or persons, or if the two companies deal with each other not at arm's length.
7. Notwithstanding the provisions of paragraph 5, a Contracting State, other than a Contracting State that imposes the additional tax on earnings referred to in paragraph 6, may tax a dividend paid by a company to the extent that the dividend is attributable to profits earned in taxable years beginning after the date of signature of the Convention if, for the three-year period ending with the close of the company's taxable period preceding the declaration of the dividend (or for such part of that three-year period as the company has been in existence, or for the first taxable year if the dividend was declared in that taxable year), at least 50 per cent of such company's gross income from all sources was included in the computation of the business profits attributable to a permanent establishment which such company had in that State; provided that where a resident of the other Contracting State is the beneficial owner of such dividend any tax so imposed on the dividend shall be subject to the limitations of paragraph 2 or the rules of paragraph 4, as the case may be.
8. Notwithstanding the provisions of paragraph 5, a company which is a resident of Canada and which has income subject to tax in the United States (without regard to the provisions of the Convention) may be liable to the United States accumulated earnings tax and personal holding company tax but only if 50 per cent or more in value of the outstanding voting shares of the company is owned, directly or indirectly, throughout the last half of its taxable year by citizens or residents of the United States (other than citizens of Canada who do not have immigrant status in the United States or who have not been residents in the United States for more than three taxable years) or by residents of a third State.

Note: Subparagraph 2(a), paragraphs 6 and 7 are amended by Article 5 of the Third Protocol.

Article XI

Interest

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

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2. However, such interest may also be taxed in the Contracting State in which it arises, and according to the laws of that State; but if a resident of the other Contracting State is the beneficial owner of such interest, the tax so charged shall not exceed 15 per cent of the gross amount of the interest.
3. Notwithstanding the provisions of paragraph 2, interest arising in a Contracting State shall be exempt from tax in that State if:
 - (a) The interest is beneficially owned by the other Contracting State, a political subdivision or local authority thereof or an instrumentality of such other State, subdivision or authority, and is not subject to tax by that other State;
 - (b) The interest is beneficially owned by a resident of the other Contracting State and is paid with respect to debt obligations issued at arm's length and guaranteed or insured by that other State or a political subdivision thereof or an instrumentality of such other State or subdivision which is not subject to tax by that other State;
 - (c) The interest is beneficially owned by a resident of the other Contracting State and is paid by the first-mentioned State, a political subdivision or local authority thereof or an instrumentality of such first-mentioned State, subdivision or authority which is not subject to tax by that first-mentioned State;
 - (d) The interest is beneficially owned by a seller who is a resident of the other Contracting State and is paid by a purchaser in connection with the sale on credit of any equipment, merchandise or services, except where the sale is made between persons dealing with each other not at arm's length; or
 - (e) The interest is paid by a company created under the laws in force in the other Contracting State with respect to an obligation entered into before the date of signature of this Convention, provided that such interest would have been exempt from tax in the first-mentioned State under Article XII of the 1942 Convention.
4. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage, and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures, as well as income assimilated to income from money lent by the taxation laws of the Contracting State in which the income arises. However, the term "interest" does not include income dealt with in Article X (Dividends).
5. The provisions of paragraphs 2 and 3 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article VII (Business Profits) or Article XIV (Independent Personal Services), as the case may be, shall apply.
6. For the purposes of this Article, interest shall be deemed to arise in a Contracting State when the payer is that State itself, or a political subdivision, local authority or resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a State other than that of which he is a resident a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such

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interest is borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the State in which the permanent establishment or fixed base is situated and not in the State of which the payer is a resident.

7. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of the Convention.
8. Where a resident of a Contracting State pays interest to a person other than a resident of the other Contracting State, that other State may not impose any tax on such interest except insofar as it arises in that other State or insofar as the debt-claim in respect of which the interest is paid is effectively connected with a permanent establishment or a fixed base situated in that other State.

Note: Paragraph 2 is amended, subparagraph 3(d) is replaced and a new paragraph 9 are amendments found in Article 6 of the Third Protocol.

Article XII

Royalties

1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
2. However, such royalties may also be taxed in the Contracting State in which they arise, and according to the laws of that State; but if a resident of the other Contracting State is the beneficial owner of such royalties, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties.

The application of the 10 per cent withholding tax was judicially considered in *Crown Forest Industries v. The Queen*, 92 DTC 6305; aff'd 94 DTC 6107 (C.A.); rev'd 95 DTC 5389 (S.C.C.), a commentary on which appears in Volume III, relative to Article IV of the Canada-U.S. Tax Convention.

- [3. Notwithstanding the provisions of paragraph 2, copyright royalties and other like payments in respect of the production or reproduction of any literary, dramatic, musical or artistic work (but not including royalties in respect of motion picture films and of works on film or videotape for use in connection with television) arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State.]

The foregoing paragraph was deleted by Article V of the First Protocol and replaced by the following:

3. Notwithstanding the provisions of paragraph 2, copyright royalties and other like payments in respect of the production or reproduction of any literary, dramatic, musical or artistic work (but not including royalties in respect of motion pictures and works on film, videotape or other means of reproduction for use in connection with television) arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State.
- [4. The term "royalties" as used in this Article means payments of any kind received

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as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work (including motion picture films and works on film or videotape for use in connection with television), any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, tangible personal property or for information concerning industrial, commercial or scientific experience, and, notwithstanding the provisions of Article XIII (Gains), includes gains from the alienation of any intangible property or rights described in this paragraph to the extent that such gains are contingent on the productivity, use or subsequent disposition of such property rights.]

The foregoing paragraph was deleted by Article V of the First Protocol and replaced by the following:

4. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work (including motion pictures and works on film, videotape or other means of reproduction for use in connection with television), any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, tangible personal property or for information concerning industrial, commercial or scientific experience, and, notwithstanding the provisions of Article XIII (Gains), includes gains from the alienation of any intangible property or rights described in this paragraph to the extent that such gains are contingent on the productivity, use or subsequent disposition of such property or rights.
5. The provisions of paragraphs 2 and 3 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article VII (Business Profits) or Article XIV (Independent Personal Services), as the case may be, shall apply.
6. For the purposes of this Article, royalties shall be deemed to arise in a Contracting State when the payer is that State itself, or a political subdivision, local authority or resident of that State. However:
 - (a) Except as provided in subparagraph (b), where the person paying the royalties, whether he is a resident of a Contracting State or not, has in a State other than that of which he is a resident a permanent establishment or a fixed base in connection with which the obligation to pay the royalties was incurred, and such royalties are borne by such permanent establishment or fixed base, then such royalties shall be deemed to arise in the State in which the permanent establishment or fixed base is situated and not in the State of which the payer is a resident; and
 - [(b) Where the royalties are for the use of intangible property or tangible personal property in a Contracting State, then such royalties shall be deemed to arise in that State and not in the State of which the payer is a resident.]

The foregoing subparagraph was deleted by Article V of the First Protocol and replaced by the following:

- (b) Where the royalties are for the use of, or right to use, intangible property or tangible personal property in a Contracting State, then such royalties shall be deemed to arise in that State and not in the State of which the payer is a resident.

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7. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.
8. Where a resident of a Contracting State pays royalties to a person other than a resident of the other Contracting State, that other State may not impose any tax on such royalties except insofar as they arise in that other State or insofar as the right or property in respect of which the royalties are paid is effectively connected with a permanent establishment or a fixed base situated in that other State.

This article was judicially considered in *Brad-Lea Meadows Ltd. v. M.N.R.* (1990), 90 DTC 1269 (T.C.C.). The case digest will be found under article 12 in the commentary section of the United States Convention, which appears in Volume III.

Note: Paragraphs 3 and 6 are deleted and replaced by new paragraphs in Article 7 of the Third Protocol.

Article XIII

Gains

1. Gains derived by a resident of a Contracting State from the alienation of real property situated in the other Contracting State may be taxed in that other State.

The procedure under this paragraph and also paragraph 13 was judicially considered in the case of *Kaplan v. The Queen*, 94 DTC 1819. The judge found it difficult to understand why the case had found its way to Court when the method used by the taxpayer was specifically delineated in Interpretation Bulletin IT 173-R2.

2. Gains from the alienation of personal property forming part of the business property of a permanent establishment which a resident of a Contracting State has or had (within the twelve-month period preceding the date of alienation) in the other Contracting State or of personal property pertaining to a fixed base which is or was available (within the twelve-month period preceding the date of alienation) to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment or of such a fixed base, may be taxed in that other State.

- [3. Gains derived by a resident of a Contracting State from the alienation of:

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- (a) *Shares forming part of a substantial interest in the capital stock of a company which is not a resident of that State the value of which shares is derived principally from real property situated in the other Contracting State; or*
- (b) *An interest in a partnership, trust or estate the value of which is derived principally from real property situated in the other Contracting State*
may be taxed in that other State, provided that the laws in force in the first-mentioned State at the time of such alienation would, in comparable circumstances, subject to taxation gains derived by a resident of that other State. For the purposes of this paragraph,
- (c) *The term "real property" includes the shares of a company the value of which shares is derived principally from real property or an interest in a partnership, trust or estate referred to in subparagraph (b), but does not include property (other than mines, oil or gas wells, rental property or property used for agriculture or forestry) in which the business of the company, partnership, trust or estate is carried on; and*
- (d) *A substantial interest exists when the resident and persons related thereto own 10 per cent or more of the shares of any class of the capital stock of a company.]*

The foregoing paragraph was deleted by Article VI of the First Protocol and replaced by the following

3. For the purposes of this Article the term "real property situated in the other Contracting State"

- (a) *In the case of real property situated in the United States, means a United States real property interest and real property referred to in Article VI (Income from Real Property) situated in the United States; and*
- (b) *In the case of real property situated in Canada means:*
 - (i) *Real property referred to in Article VI (Income from Real Property) situated in Canada;*
 - (ii) *A share of the capital stock of a company, the value of whose shares is derived principally from real property situated in Canada; and*
 - (iii) *An interest in a partnership, trust or estate, the value of which is derived principally from real property situated in Canada.*

4. Gains from the alienation of any property other than that referred to in paragraphs 1, 2 and 3 shall be taxable only in the Contracting State of which the alienator is a resident.

[5. *The provisions of paragraph 4 shall not affect the right of a Contracting State to levy a tax on gains from the alienation of property derived by an individual who is a resident of the other Contracting State if such individual:*

- (a) *Was a resident of the first-mentioned State for 120 months during any period of 20 consecutive years; and*
- (b) *Was a resident of the first-mentioned State at any time during the ten years immediately preceding the alienation of the property.]*

The foregoing paragraph was deleted by Article VI of the First Protocol and replaced by the following:

5. The provisions of paragraph 4 shall not affect the right of a Contracting State to levy tax on gains from the alienation of property derived by an individual who is a resident of the other Contracting State if such individual:

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- (a) Was a resident of the first-mentioned State for 120 months during any period of 20 consecutive years preceding the alienation of the property; and
- (b) Was a resident of the first-mentioned State at any time during the ten years immediately preceding the alienation of the property;

and if such property (or property for which such property was substituted in an alienation the gain on which was not recognized for the purposes of taxation in the first-mentioned State) was owned by the individual at the time he ceased to be a resident of the first-mentioned State.

- 6. Where an individual (other than a citizen of the United States) who was a resident of Canada became a resident of the United States, in determining his liability to United States taxation in respect of any gain from the alienation of a principal residence in Canada owned by him at the time he ceased to be a resident of Canada, the adjusted basis of such property shall be no less than its fair market value at that time.
- 7. Where at any time an individual is treated for the purposes of taxation by a Contracting State as having alienated a property and is taxed in that State by reason thereof and the domestic law of the other Contracting State at such time defers (but does not forgive) taxation, that individual may elect in his annual return of income for the year of such alienation to be liable to tax in the other Contracting State in that year as if he had, immediately before that time, sold and repurchased such property for an amount equal to its fair market value at that time.
- 8. Where a resident of a Contracting State alienates property in the course of a corporate organization, reorganization, amalgamation, division or similar transaction and profit, gain or income with respect to such alienation is not recognized for the purpose of taxation in that State, if requested to do so by the person who acquires the property, the competent authority of the other Contracting State may agree, in order to avoid double taxation and subject to terms and conditions satisfactory to such competent authority, to defer the recognition of the profit, gain or income with respect to such property for the purpose of taxation in that other State until such time and in such manner as may be stipulated in the agreement.
- 9. *Where a resident of a Contracting State alienates property which may in accordance with this Article be taxed in the other Contracting State and which was owned by a resident of the first-mentioned State on the date of signature of this Convention, the amount of the gain which is liable to tax in that other State in accordance with this Article shall be reduced by the proportion of the gain attributable (on a monthly basis), or such greater portion of the gain as is shown to the satisfaction of the competent authority of the other State to be reasonably attributable, to the period ending on December 31 of the year in which the Convention enters into force; the provisions of this paragraph shall not apply to property which on the date of signature of the Convention formed part of the business property of a permanent establishment or pertained to a fixed base in the other Contracting State.]*

The foregoing paragraph was deleted by Article VI of the First Protocol and replaced by the following:

- 9. Where a person who is a resident of a Contracting State alienates a capital asset which may in accordance with this Article be taxed in the other Contracting State and
 - (a) That person owned the asset on September 26, 1980 and was resident in the first-mentioned State on that date; or

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- (b) The asset was acquired by that person in an alienation of property which qualified as a non-recognition transaction for the purposes of taxation in that other State;

the amount of the gain which is liable to tax in that other State in accordance with this Article shall be reduced by the proportion of the gain attributable on a monthly basis to the period ending on December 31 of the year in which the Convention enters into force, or such greater portion of the gain as is shown to the satisfaction of the competent authority of the other State to be reasonably attributable to that period. For the purposes of this paragraph the term "non-recognition transaction" includes a transaction to which paragraph 8 applies and, in the case of taxation in the United States, a transaction that would have been a non-recognition transaction but for Sections 897(d) and 897(e) of the Internal Revenue Code. The provisions of this paragraph shall not apply to

- (c) An asset that on September 26, 1980 formed part of the business property of a permanent establishment or pertained to a fixed base of a resident of a Contracting State situated in the other Contracting State;
- (d) An alienation by a resident of the Contracting State of an asset that was owned at any time after September 26, 1980 and before such alienation by a person who was not at all times after that date while the asset was owned by such person as a resident of that State; or
- (e) An alienation of an asset that was acquired by a person at any time after September 26, 1980 and before such alienation in a transaction other than a non-recognition transaction.

Note: Paragraph 8 is deleted and replaced by a new paragraph in Article 8 of the Third Protocol.

Article XIV

Independent Personal Services

Income derived by an individual who is a resident of a Contracting State in respect of independent personal services may be taxed in that State. Such income may also be taxed in the other Contracting State if the individual has or had a fixed base regularly available to him in that other State but only to the extent that the income is attributable to the fixed base.

Article XV

Dependent Personal Services

1. Subject to the provisions of Articles XVIII (Pensions and Annuities) and XIX (Government Services), salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.
2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in a calendar year in the other Contracting State shall be taxable only in the first-mentioned State if:

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- (a) Such remuneration does not exceed ten thousand dollars (\$10,000) in the currency of that other State; or
 - (b) The recipient is present in the other Contracting State for a period or periods not exceeding in the aggregate 183 days in that year and the remuneration is not borne by an employer who is a resident of that other State or by a permanent establishment or a fixed base which the employer has in that other State.
3. Notwithstanding the provisions of paragraphs 1 and 2, remuneration derived by a resident of a Contracting State in respect of an employment regularly exercised in more than one State on a ship, aircraft, motor vehicle or train operated by a resident of that Contracting State shall be taxable only in that State.

Article XVI

Artistes and Athletes

1. Notwithstanding the provisions of Articles XIV (Independent Personal Services) and XV (Dependent Personal Services), income derived by a resident of a Contracting State as an entertainer, such as theatre, motion picture, radio or television artiste, or a musician, or as an athlete, from his personal activities such as exercised in the other Contracting State, may be taxed in that other State, except where the amount of the gross receipts derived by such entertainer or athlete, including expenses reimbursed to him or borne on his behalf, from such activities do not exceed fifteen thousand dollars (\$15,000) in the currency of that other State for the calendar year concerned.
2. Where income in respect of personal activities exercised by an entertainer or an athlete in his capacity as such accrues not to the entertainer or athlete but to another person, that income may, notwithstanding the provisions of Articles VII (Business Profits), XIV (Independent Personal Services) and XV (Dependent Personal Services), be taxed in the Contracting State in which the activities of the entertainer or athlete are exercised. For the purposes of the preceding sentence, income of an entertainer or athlete shall be deemed not to accrue to another person if it is established that neither the entertainer or athlete, nor persons related thereto, participate directly or indirectly in the profits of such other person in any manner, including the receipt of deferred remuneration, bonuses, fees, dividends, partnership distributions or other distributions.
- [3. *The provisions of this Article shall not apply to the income of an athlete in respect of an employment with a team which participates in a league with regularly scheduled games in both Contracting States.*]

The foregoing paragraph was deleted by Article VII of the First Protocol and replaced by the following:

3. The provisions of paragraphs 1 and 2 shall not apply to the income of:
- (a) An athlete in respect of his activities as an employee of a team which participates in a league with regularly scheduled games in both Contracting States; or
 - (b) A team described in subparagraph (a).

Article VII of the First Protocol added the following new paragraph 4:

4. Notwithstanding the provisions of Articles XIV (Independent Personal Services)

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and XV (Dependent Personal Services) an amount paid by a resident of a Contracting State to a resident of the other Contracting State as an inducement to sign an agreement relating to the performance of the services of an athlete (other than an amount referred to in paragraph 1 of Article XV (Dependent Personal Services)) may be taxed in the first-mentioned State, but the tax so charged shall not exceed 15 per cent of the gross amount of such payment.

Article XVII

Withholding of Taxes In Respect of (Independent) Personal Services

Retitled by Article VIII of the First Protocol.

1. Deduction and withholding of tax on account of the tax liability for a taxable year on remuneration paid to an individual who is a resident of a Contracting State (including an entertainer or athlete) in respect of the performance of independent personal services in the other Contracting State may be required by that other State, but with respect to the first five thousand dollars (\$5,000) in the currency of that other State, paid as remuneration in that taxable year by each payor, such deduction and withholding shall not exceed 10 per cent of the payment.
- [2. Where the competent authority of a Contracting State considers that an amount that would otherwise be deducted or withheld from any amount paid or credited to an individual who is a resident of the other Contracting State in respect of the performance of independent personal services in the first-mentioned State is excessive in relation to the estimated tax liability for the taxable year of that individual in the first-mentioned State, it may determine that a lesser amount will be deducted or withheld.]

The foregoing paragraph was deleted by Article VIII of the First Protocol and replaced by the following:

2. Where the competent authority of a Contracting State considers that an amount that would otherwise be deducted or withheld from any amount paid or credited to an individual who is a resident of the other Contracting State in respect of the performance of personal services in the first-mentioned State is excessive in relation to the estimated tax liability for the taxable year of that individual in the first-mentioned State, it may determine that a lesser amount will be deducted or withheld.
3. The provisions of this Article shall not affect the liability of a resident of a Contracting State referred to in paragraph 1 or 2 for tax imposed by the other Contracting State.

Article XVIII

Pensions and Annuities

- [1. Pensions and annuities arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State, but the amount of any pension included in income for the purposes of taxation in that other State shall not exceed the amount that would be included in the first-mentioned State if the recipient were a resident thereof.]

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The foregoing paragraph was deleted by Article IX of the First Protocol and replaced by the following:

1. Pensions and annuities arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State, but the amount of any such pension that would be excluded from taxable income in the first-mentioned State if the recipient were a resident thereof shall be exempt from taxation in that other State.
2. However:
 - (a) Pensions may also be taxed in the Contracting State in which they arise and according to the laws of that State; but if a resident of the other Contracting State is the beneficial owner of a periodic pension payment, the tax so charged shall not exceed 15 per cent of the gross amount of such payment; and
 - [(b) Annuities may also be taxed in the Contracting State in which they arise and according to the laws of that State; but if a resident of the other Contracting State is the beneficial owner of an annuity payment, the tax so charged shall not exceed 15 per cent of the portion of such payment that is liable to tax in the first-mentioned State.]*

The foregoing subparagraph was deleted by Article IX of the First Protocol and replaced by the following:

- (b) Annuities may also be taxed in the Contracting State in which they arise and according to the laws of that State; but if a resident of the other Contracting State is the beneficial owner of an annuity payment, the tax so charged shall not exceed 15 per cent of the portion of such payment that would not be excluded from taxable income in the first-mentioned State if the beneficial owner were a resident thereof.
3. For the purposes of this Convention, the term "pensions" includes any payment under a superannuation, pension or retirement plan, Armed Forces retirement pay, war veterans pensions and allowances and amounts paid under a sickness, accident or disability plan, but does not include payments under an income-averaging annuity contract or any benefit referred to in paragraph 5.
4. For the purposes of the Convention, the term "annuities" means a stated sum paid periodically at stated times during life or during a specified number of years, under an obligation to make the payments in return for adequate and full consideration (other than services rendered), but does not include a payment that is not a periodic payment or any annuity the cost of which was deductible for the purposes of taxation in the Contracting State in which it was acquired.
- [5. Benefits under the social security legislation in a Contracting State paid to a resident of the other Contracting State or a citizen of the United States shall be taxable only in the first-mentioned State.]*

The foregoing paragraph was deleted by Article 1 of the Second Protocol and replaced by the following:

5. Benefits under the social security legislation in a Contracting State paid to a resident of the other Contracting State shall be taxable as follows:
 - (a) Such benefits shall be taxable only in that other State;
 - (b) Notwithstanding the provisions of subparagraph (a), one-half of the total amount of any such benefit paid in a taxable year shall be exempt from taxation in that other State.

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[6. *Alimony and other similar amounts (including child support payments) arising in a Contracting State and paid to a resident of the other Contracting State shall be taxable only in that other State, but the amount included in income for the purposes of taxation in that other State shall not exceed the amount that would be included in income in the first-mentioned State if the recipient were a resident thereof.*]

The foregoing paragraph was deleted by Article IX of the First Protocol and replaced by the following:

6. *Alimony and other similar amounts (including child support payments) arising in a Contracting State and paid to a resident of the other Contracting State shall be taxable as follows:*

(a) *Such amounts shall be taxable only in that other State;*

(b) *Notwithstanding the provisions of subparagraph (a), the amount that would be excluded from taxable income in the first-mentioned State if the recipient were a resident thereof shall be exempt from taxation in that other State.*

Note: Paragraphs 3 and 5 are deleted and replaced; a new paragraph 7 is added by Article 9 of the Third Protocol.

Article XIX

Government Service

Remuneration, other than a pension, paid by a Contracting State or a political subdivision or local authority thereof to a citizen of that State in respect of services rendered in the discharge of functions of a governmental nature shall be taxable only in that State. However, the provisions of Article XIV (Independent Personal Services), XV (Dependent Personal Services) or XVI (Artistes and Athletes), as the case may be, shall apply, and the preceding sentence shall not apply, to remuneration paid in respect of services rendered in connection with a trade or business carried on by a Contracting State or a political subdivision or local authority thereof.

Article XX

Students

Payments which a student, apprentice or business trainee, who is or was immediately before visiting a Contracting State a resident of the other Contracting State, and who is present in the first-mentioned State for the purpose of this full-time education or training, receives for the purpose of his maintenance, education or training shall not be taxed in that State provided that such payments are made to him from outside that State.

Article XXI

Exempt Organizations

1. Subject to the provisions of paragraph 3, income derived by a religious, scientific, literary, educational or charitable organization shall be exempt from tax in a Contracting State if it is resident in the other Contracting State but only to the extent that such income is exempt from tax in that other State.

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- [2. *Subject to the provisions of paragraph 3, income referred to in Articles X (Dividends) and XI (Interest) derived by a trust, company or other organization constituted and operated exclusively to administer or provide benefits under one or more funds or plans established to provide pension, retirement or other employee benefits shall be exempt from tax in a Contracting State if it is resident in the other Contracting State and its income is generally exempt from tax in that other State.*]

The foregoing paragraph was deleted by Article X of the First Protocol and replaced by the following:

2. Subject to the provisions of paragraph 3, income referred to in Articles X (Dividends) and XI (Interest) derived by:

(a) A trust, company or other organization which is resident in a Contracting State, generally exempt from tax in a taxable year in that State and constituted and operated exclusively to administer or provide benefits under one or more funds or plans established to provide pension, retirement or other employee benefits; or

(b) A trust, company or other organization which is resident in a Contracting State, not taxed in a taxable year in that State and constituted and operated exclusively to earn income for the benefit of an organization referred to in subparagraph (a);

shall be exempt from tax in that taxable year in the other Contracting State.

3. The provisions of paragraphs 1 and 2 shall not apply with respect to the income of a trust, company or other organization from carrying on a trade or business or from a related person other than a person referred to in paragraph 1 or 2.
4. A religious, scientific, literary, educational or charitable organization which is resident in Canada and which has received substantially all of its support from persons other than citizens or residents of the United States shall be exempt in the United States from the United States excise taxes imposed with respect to private foundations.
5. For the purposes of the United States taxation, contributions by a citizen or resident of the United States to an organization which is resident in Canada, which is generally exempt from Canadian tax and which could qualify in the United States to receive deductible contributions if it were resident in the United States shall be treated as charitable contributions; however, such contributions (other than such contributions to a college or university at which the citizen or resident or a member of his family is or was enrolled) shall not be deductible in any taxable year to the extent that they exceed an amount determined by applying the percentage limitations of the laws of the United States in respect of the deductibility of charitable contributions to the income of such citizen or resident arising in Canada. The preceding sentence shall not be interpreted to allow in any taxable year deductions for charitable contributions in excess of the amount allowed under the percentage limitations of the laws of the United States in respect of the deductibility of charitable contributions.
6. For the purposes of Canadian taxation, gifts by a resident of Canada to an organization which is resident in the United States, which is generally exempt from United States tax and which could qualify in Canada to receive deductible gifts if it were created or established and resident in Canada shall be treated as gifts to a registered charity; however, such gifts (other than such gifts to a college or university at which the resident or a member of his family is or was enrolled) shall not be deductible in any taxable year to the extent that they exceed an amount

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determined by applying the percentage limitations of the laws of Canada in respect of the deductibility of gifts to registered charities to the income of such resident arising in the United States. The preceding sentence shall not be interpreted to allow in any taxable year deductions for gifts to registered charities in excess of the amount allowed under the percentage limitations of the laws of Canada in respect of the deductibility of gifts to registered charities.

Note: Paragraphs 2 and 3 are deleted and replaced by subparagraphs 2(a), 2(b) and paragraph 3 of Article 10 of the Third Protocol. Article 10 also adds a new sentence at the end of paragraph 5 and replaces paragraph 6.

Article XXII

Other Income

1. Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State, except that if such income arises in the other Contracting State it may also be taxed in that other State.
2. To the extent that income distributed by an estate or trust is subject to the provision of paragraph 1, then, notwithstanding such provisions, income distributed by an estate or trust which is a resident of a Contracting State to a resident of the other Contracting State who is a beneficiary of the estate or trust may be taxed in the first-mentioned State and according to the laws of that State, but the tax so charged shall not exceed 15 per cent of the gross amount of the income; provided, however, that such income shall be exempt from tax in the first-mentioned State to the extent of any amount distributed out of income arising outside that State.

Note: A new paragraph 3 is added to this Article by Article 11 of the Third Protocol.

Article XXIII

Capital

1. Capital represented by real property, owned by a resident of a Contracting State and situated in the other Contracting State, may be taxed in that other State.
2. Capital represented by personal property forming part of the business property of a permanent establishment which a resident of a Contracting State has in the other Contracting State, or by personal property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, may be taxed in that other State.
3. Capital represented by ships and aircraft operated by a resident of a Contracting State in international traffic, and by personal property pertaining to the operation of such ships and aircraft, shall be taxable only in that State.
4. All other elements of capital of a resident of a Contracting State shall be taxable only in that State.

Article XXIV

Elimination of Double Taxation

- [1. In the case of the United States, subject to the provisions of paragraphs 4, 5 and

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6. double taxation shall be avoided as follows: In accordance with the provisions and subject to the limitations of law of the United States (as it may be amended from time to time without changing the general principle hereof), the United States shall allow to a citizen or resident of the United States, or to a company electing to be treated as a domestic corporation, as a credit against the United States tax on income the appropriate amount of income tax paid or accrued to Canada; and, in the case of a company which is a resident of the United States owning at least 10 per cent of the voting stock of a company which is a resident of Canada from which it receives dividends in any taxable year, the United States shall allow as a credit against the United States tax on income the appropriate amount of income tax paid or accrued to Canada by that company with respect to the profits out of which such dividends are paid. Such appropriate amount shall be based upon the amount of income tax paid or accrued to Canada, but shall not exceed that proportion of the United States tax that taxable income arising in Canada bears to the entire taxable income.]

The foregoing paragraph was deleted by Article XI of the First Protocol and replaced by the following:

1. In the case of the United States, subject to the provisions of paragraphs 4, 5 and 6, double taxation shall be avoided as follows: In accordance with the provisions and subject to the limitations of law of the United States (as it may be amended from time to time without changing the general principle hereof), the United States shall allow to a citizen or resident of the United States, or to a company electing to be treated as a domestic corporation, as a credit against the United States tax on income the appropriate amount of income tax paid or accrued to Canada; and, in the case of a company which is a resident of the United States owning at least 10 per cent of the voting stock of a company which is a resident of Canada from which it receives dividends in any taxable year, the United States shall allow as a credit against the United States tax on income the appropriate amount of income tax paid or accrued to Canada by that company with respect to the profits out of which such dividends are paid.
- [2. In the case of Canada, subject to the provisions of paragraphs 4, 5 and 6, double taxation shall be avoided as follows:
 - (a) Subject to the provisions of the law of Canada regarding the deduction from tax payable in Canada of tax paid in a territory outside Canada and to any subsequent modification of those provisions (which shall not affect the general principle hereof), and unless a greater deduction or relief is provided under the law of Canada, income tax paid or accrued to the United States on profits, income or gains arising in the United States shall be deducted from any Canadian tax payable in respect of such profits, income or gains; and
 - (b) Subject to the provisions of the law of Canada regarding the determination of the exempt surplus of a foreign affiliate and to any subsequent modification of those provisions (which shall not affect the general principle hereof), for the purposes of computing Canadian tax, a company which is a resident of Canada shall be allowed to deduct in computing its taxable income any dividend received by it out of the exempt surplus of a foreign affiliate which is a resident of the United States.]

The foregoing paragraph was deleted by Article XI of the First Protocol and replaced by the following:

2. In the case of Canada, subject to the provisions of paragraphs 4, 5 and 6, double taxation shall be avoided as follows:

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- (a) Subject to the provisions of the law of Canada regarding the deduction from tax payable in Canada of tax paid in a territory outside Canada and to any subsequent modification of those provisions (which shall not affect the general principle hereof), and unless a greater deduction or relief is provided under the law of Canada, income tax paid or accrued to the United States on profits, income or gains arising in the United States shall be deducted from any Canadian tax payable in respect of such profits, income or gains;
 - (b) Subject to the provisions of the law of Canada regarding the determination of the exempt surplus of a foreign affiliate and to any subsequent modification of those provisions (which shall not affect the general principle hereof), for the purposes of computing Canadian tax, a company which is a resident of Canada shall be allowed to deduct in computing its taxable income any dividend received by it out of the exempt surplus of a foreign affiliate which is a resident of the United States; and
 - (c) Notwithstanding the provisions of subparagraph (a), where Canada imposes a tax on gains from the alienation of property that, but for the provisions of paragraph 5 of Article XIII (Gains), would not be taxable in Canada, income tax paid or accrued to the United States on such gains shall be deducted from any Canadian tax payable in respect of such gains.
3. For the purposes of this Article:
- (a) Profits, income or gains (other than gains to which paragraph 5 of Article XIII (Gains) applies) of a resident of a Contracting State which may be taxed in the other Contracting State in accordance with the Convention (without regard to paragraph 2 of Article XXIX (Miscellaneous Rules)) shall be deemed to arise in that other State; and
 - (b) Profits, income or gains of a resident of a Contracting State which may not be taxed in the other Contracting State in accordance with the Convention (without regard to paragraph 2 of Article XXIX (Miscellaneous Rules)) or to which paragraph 5 of Article XIII (Gains) applies shall be deemed to arise in the first-mentioned State.
4. Where a United States citizen is a resident of Canada, the following rules shall apply:
- (a) Canada shall allow a deduction from the Canadian tax in respect of income tax paid or accrued to the United States in respect of profits, income or gains which arise (within the meaning of paragraph 3) in the United States, except that such deduction need not exceed the amount of tax that would be paid to the United States if the resident were not a United States citizen; and
 - (b) For the purposes of computing the United States tax, the United States shall allow as a credit against United States tax the income tax paid or accrued to Canada after the deduction referred to in subparagraph (a). The credit so allowed shall not reduce that portion of the United States tax that is deductible from Canadian tax in accordance with subparagraph (a).
5. Notwithstanding the provisions of paragraph 4, where a United States citizen is a resident of Canada, the following rules shall apply in respect of the items of income referred to in Article X (Dividends), XI (Interest) or XII (Royalties) which arise (within the meaning of paragraph 3) in the United States, as long as the law in force in Canada allows a deduction in computing income for the portion of any foreign tax paid in respect of such items which exceeds 15 per cent of the amount thereof:
- (a) The deduction so allowed in Canada shall not be reduced by any credit or

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deduction for income tax paid or accrued to Canada allowed in computing the United States tax on such items;

- (b) Canada shall allow a deduction from the Canadian tax in respect of the income paid or accrued to the United States on such items, except that such deduction need not exceed 15 per cent of the gross amount of such items that has been included in computing the income of the citizen for Canadian tax purposes; and
 - (c) For the purposes of computing the United States tax on such items, the United States shall allow as a credit against United States tax the income tax paid or accrued to Canada after the deduction referred to in subparagraph (b). The credit so allowed shall reduce only that portion of the United States tax on such items which exceeds 15 per cent of the amount thereof included in computing United States taxable income.
6. Where a United States citizen is a resident of Canada, items of income referred to in paragraph 4 or 5 shall, notwithstanding the provisions of paragraph 3, be deemed to arise in Canada to the extent necessary to avoid the double taxation of such income under paragraph 4(b) or paragraph 5(c).
7. For the purposes of this Article, any reference to "income tax paid or accrued" to a Contracting State shall include Canadian tax and United States tax, as the case may be, and taxes of general application which are paid or accrued to a political subdivision or local authority of that State, which are not imposed by that political subdivision or local authority in a manner inconsistent with the provisions of the Convention and which are substantially similar to the taxes of that State referred to in paragraphs 2 and 3(a) of Article II (Taxes Covered).
8. Where a resident of a Contracting State owns capital which, in accordance with the provisions of the Convention, may be taxed in the other Contracting State, the first-mentioned State shall allow as a deduction from the tax on the capital of that resident an amount equal to the capital tax paid in that other State. The deduction shall not, however, exceed that part of the capital tax, as computed before the deduction is given, which is attributable to the capital which may be taxed in that other State.

The following paragraph 9 was added to the Article by Article XI of the First Protocol:

9. The provisions of this Article relating to the source of profits, income or gains shall not apply for the purpose of determining a credit against United States tax for any foreign taxes other than income taxes paid or accrued to Canada.

Note: Subparagraphs 2(a) and 2(b), paragraphs 5 and 7 are deleted and replaced and a new paragraph 10 has been added by Article 12 of the Third Protocol.

Article XXV

Non-Discrimination

- 1. Citizens of a Contracting State, who are residents of the other Contracting State, shall not be subjected in that other State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which citizens of that other State in the same circumstances are or may be subjected.
- 2. Citizens of a Contracting State, who are not residents of the other Contracting

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State, shall not be subjected in that other State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which citizens of any third State in the same circumstances (including State of residence) are or may be subjected.

3. In determining the taxable income of an individual who is a resident of a Contracting State, there shall be allowed as a deduction in respect of any other person who is a resident of the other Contracting State and who is dependent on the individual for support the amount that would be so allowed if that other person were a resident of the first-mentioned State.
4. Where a married individual who is a resident of Canada and not a citizen of the United States has income that is taxable in the United States pursuant to Article XV (Dependent Personal Services), the United States tax with respect to such income shall not exceed such proportion of the total United States tax that would be payable for the taxable year if both the individual and his spouse were United States citizens as the individual's taxable income determined without regard to this paragraph bears to the amount that would be the total taxable income of the individual and his spouse. For the purpose of this paragraph,
 - (a) The "total United States tax" shall be determined as if all the income of the individual and his spouses arose in the United States; and
 - (b) A deficit of the spouse shall not be taken into account in determining taxable income.
5. Any company which is a resident of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar companies of the first-mentioned State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of a third State, are or may be subjected.
6. *Notwithstanding the provisions of Article XXIV (Elimination of Double Taxation), the taxation on a permanent establishment which a resident of a Contracting State has in the other Contracting State shall not be less favorably levied in the other State than the taxation levied on residents of the other State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.*

The foregoing paragraph was deleted by Article XII of the First Protocol and replaced by the following:

6. Notwithstanding the provisions of Article XXIV (Elimination of Double Taxation), the taxation on a permanent establishment which a resident of a Contracting State has in the other Contracting State shall not be less favorably levied in the other State than the taxation levied on residents of the other State carrying on the same activities. This paragraph shall not be construed as obliging a Contracting State:
 - (a) To grant to a resident of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents; or
 - (b) To grant to a company which is a resident of the other Contracting State the

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same tax relief that it provides to a company which is a resident of the first-mentioned State with respect to dividends received by it from a company.

7. Except where the provisions of paragraph 1 of Article IX (Related Persons), paragraph 7 of Article XI (Interest) or paragraph 7 of Article XII (Royalties) apply, interest, royalties and other disbursements paid by a resident of a Contracting State to a resident of the other Contracting State shall, for the purposes of determining the taxable profits of the first-mentioned resident, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State. Similarly, any debts of a resident of a Contracting State shall, for the purposes of determining the taxable capital of the first-mentioned resident, be deductible under the same conditions as if they had been contracted to a resident of the first-mentioned States.
8. The provisions of paragraph 7 shall not affect the operation of any provision of the taxation laws of a Contracting State:
 - (a) Relating to the deductibility of interest and which is in force on the date of signature of this Convention (including any subsequent modification of such provisions that do not change the general nature thereof); or
 - (b) Adopted after such date by a Contracting State and which is designed to ensure that a person who is not a resident of that State does not enjoy, under the laws of that State, a tax treatment that is more favorable than that enjoyed by residents of that State.

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9. Expenses incurred by a citizen or resident of a Contracting State with respect to any convention (including any seminar, meeting, congress or other function of a similar nature) held in the other Contracting State shall, for the purposes of taxation in the first-mentioned State, be deductible to the same extent that such expenses would be deductible if the convention were held in the first-mentioned State.
10. Notwithstanding the provisions of Article II (Taxes Covered), this Article shall apply:
 - (a) In the case of Canada, to all taxes imposed under the *Income Tax Act*, and
 - (b) In the case of the United States, to all taxes imposed under the Internal Revenue Code.

Note: Paragraph 3 is deleted and replaced by paragraph 1 of Article 13 of the Third Protocol. Paragraph 10 is deleted and replaced by paragraph 2 of Article 13 of the Third Protocol.

Article XXVI

Mutual Agreement Procedure

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case in writing to the competent authority of the Contracting State of which he is a resident or, if he is a resident of neither Contracting State, of which he is a national.
2. The competent authority of the Contracting State to which the case has been presented shall endeavor, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Except where the provisions of Article IX (Related Persons) apply, any agreement reached shall be implemented notwithstanding any time or other procedural limitations in the domestic law of the Contracting States, provided that the competent authority of the other Contracting State has received notification that such a case exists within six years from the end of the taxable year to which the case relates.
3. The competent authorities of the Contracting States shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. In particular, the competent authorities of the Contracting States may agree:
 - (a) To the same attribution of profits to a resident of a Contracting State and its permanent establishment situated in the other Contracting State;
 - (b) To the same allocation of income, deductions, credits or allowances between persons;
 - (c) To the same determination of the source, and the same characterization, of particular items of income;
 - (d) To a common meaning of any term used in the Convention;
 - (e) To the elimination of double taxation with respect to income distributed by an estate or trust;

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- (f) To the elimination of double taxation with respect to a partnership; or
- (g) To increases in any dollar amounts referred to in the Convention to reflect monetary or economic developments.

The may also consult together for the elimination of double taxation in cases not provided for in the Convention.

- 4. Each of the Contracting States will endeavor to collect on behalf of the other Contracting State such amounts as may be necessary to ensure that relief granted by the Convention from taxation imposed by that other State does not ensure to the benefit of persons not entitled thereto. However, nothing in this paragraph shall be construed as imposing on either of the Contracting States the obligation to carry out administrative measures of a different nature from those used in the collection of its own tax or which would be contrary to its public policy (ordre public).
- 5. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs.

Note: Subparagraphs 3(f) and 3(g) are deleted and replaced by subparagraphs 3(f), 3(g) and 3(h). A new paragraph 6 has been added, all by Article 14 of the Third Protocol.

Article XXVI A

Assistance in Collection

This is a new Article added by Article 15 of the Third Protocol. It has 11 paragraphs.

Article XXVII

Exchange of Information

- 1. The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws in the Contracting States concerning taxes covered by the Convention insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Article I (Personal Scope). Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the taxation laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the administration and enforcement in respect of, or the determination of appeals in relation to, the taxes covered by the Convention. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.
- 2. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall endeavor to obtain the information to which the request relates in the same way as if its own taxation was involved notwithstanding the fact that the other State does not, at that time, need such information. If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall endeavor to provide information

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under this Article in the form requested, such as depositions of witnesses and copies of unedited original documents (including books, papers, statements, records, accounts or writings), to the same extent such depositions and documents can be obtained under the laws and administrative practices of that other State with respect to its own taxes.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:
 - (a) To carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
 - (b) To supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State; or
 - (c) To supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*).
4. Notwithstanding the provisions of Article II (Taxes Covered) for the purposes of this Article the Convention shall apply:
 - (a) In the case of Canada, to all taxes imposed by the Government of Canada on estates and gifts and under the *Income Tax Act*; and
 - (b) In the case of the United States, to all taxes imposed under the Internal Revenue Code.

This article was judicially considered in *Montreal Aluminum Processing Inc. v. Canada*, [1991] 2 CTC 70 (F.C.T.D.); *revd* 92 DTC 6567 (F.C.A.). The case digest will be found under article 27 in the commentary section of the United States Convention, which appears in Volume III.

Note: Paragraphs 1 and 4 are deleted and replaced by Article 17 of the Third Protocol.

Article XXVIII

Diplomatic Agents and Consular Officers

Nothing in this Convention shall affect the fiscal privileges of diplomatic agents or consular officers under the general rules of international law or under the provisions of special agreements.

Article XXIX

Miscellaneous Rules

1. The provisions of this Convention shall not restrict in any manner any exclusion, exemption, deduction, credit, or other allowance now or hereafter accorded by the laws of a Contracting State in the determination of the tax imposed by that State.
- [2. *Except as provided in paragraph 3, nothing in the Convention shall be construed as preventing a Contracting State from taxing its residents (as determined under Article IV (Residence)) and, in the case of the United States, its citizens (including a former citizen whose loss of citizenship had as one of its principal purposes the avoidance of income tax, but only for a period of ten years following such loss) and companies electing to be treated as domestic corporations, as if there were no convention between the United States and Canada with respect to taxes on income and on capital.*]

The foregoing paragraph was deleted by Article XIII of the First Protocol and replaced by the following:

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2. Except as provided in paragraph 3, nothing in the Convention shall be construed as preventing a Contracting State from taxing its residents (as determined under Article IV (Residence)) and, in the case of the United States, its citizens (including a former citizen whose loss of citizenship had as one of its principal purposes the avoidance of tax, but only for a period of ten years following such loss) and companies electing to be treated as domestic corporations, as if there were no convention between the United States and Canada with respect to taxes on income and on capital.
3. The provisions of paragraph 2 shall not affect the obligations undertaken by a Contracting State:

[(a) Under paragraphs 3 and 4 of Article IX (Related Persons), paragraphs 6 and 7 of Article XIII (Gains), paragraph 5 of Article XXIX (Miscellaneous Rules), paragraphs 3 and 5 of Article XXX (Entry into Force), and Articles XVIII (Pensions and Annuities), XIX (Government Service), XXI (Exempt Organizations), XXIV (Elimination of Double Taxation), XXV (Non-Discrimination) and XXVI (Mutual Agreement Procedure); and]

The foregoing paragraph was deleted by Article XIII of the First Protocol and replaced by the following:

- (a) Under paragraphs 3 and 4 of Article IX (Related Persons), paragraphs 6 and 7 of Article XIII (Gains), paragraphs 1, 3, 4, 5 and 6(b) of Article XVIII (Pensions and Annuities), paragraph 5 of Article XXIX (Miscellaneous Rules), paragraphs 3 and 5 of Article XXX (Entry into Force), and Articles XIX (Government Service), XXI (Exempt Organizations), XXIV (Elimination of Double Taxation), XXV (Non-Discrimination) and XXVI (Mutual Agreement Procedure); and*

The foregoing subparagraph, in turn, was deleted by Article II of the Second Protocol and replaced by the following:

- (a) Under paragraphs 3 and 4 of Article IX (Related Persons), paragraphs 6 and 7 of Article XIII (Gains), paragraphs 1, 3, 4, 5(b) and 6(b) of Article XVIII (Pensions and Annuities), paragraphs 5 and 7 of Article XXIX (Miscellaneous Rules), paragraphs 3 and 5 of Article XXX (Entry into Force), and Articles XIX (Government Service), XXI (Exempt Organizations), XXIV (Elimination of Double Taxation), XXV (Non-Discrimination) and XXVI (Mutual Agreement Procedure); and*
 - (b) Under Article XX (Students), towards individuals who are neither citizens of, nor have immigrant status in, that State.*
4. *With respect to taxable years not barred by the statute of limitations ending on or before December 31 of the year in which the Convention enters into force, income from personal services not subject to tax by the United States under the 1942 Convention shall not be considered wages or net earnings from self-employment for purposes of social security taxes imposed under the Internal Revenue Code.]*

The foregoing paragraph was deleted by Article XIII of the First Protocol and replaced by the following:

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4. With respect to taxable years not barred by the statute of limitations ending on or before December 31 of the year before the year in which the Social Security Agreement between Canada and the United States (signed in Ottawa on March 11, 1981) enters into force, income from personal services not subject to tax by the United States under this Convention or the 1942 Convention shall not be considered wages or net earnings from self-employment for purposes of social security taxes imposed under the Internal Revenue Code.
- [5. A United States citizen who is a resident of Canada and a beneficiary of a Canadian registered retirement savings plan may elect, under rules established by the competent authority of the United States, to defer United States taxation with respect to any income accrued in the plan but not distributed by the plan, until such time as a distribution is made from such plan, or any plan substituted therefor.]

The foregoing paragraph was deleted by Article XIII of the First Protocol and replaced by the following:

5. A beneficiary of a Canadian registered retirement savings plan may elect, under rules established by the competent authority of the United States, to defer United States taxation with respect to any income accrued in the plan but not distributed by the plan, until such time as a distribution is made from such plan, or any plan substituted therefor. The provisions of the preceding sentence shall not apply to income which is reasonably attributable to contributions made to the plan by the beneficiary while he was not a resident of Canada.
- [6. If 25 per cent or more of the capital of a company which is a resident of a Contracting State is owned directly or indirectly by individuals who are not residents of that State, and if by reason of special measures the tax imposed in that State on that company with respect to dividends (other than dividends referred to in paragraph 2(a) of Article X (Dividends)), interest or royalties arising in the other Contracting State is substantially less than the tax generally imposed by the first-mentioned State on corporate business profits, then, notwithstanding the provisions of Article X (Dividends), XI (Interest) or XII (Royalties), that other State may tax such dividends, interest or royalties as if there were no convention between the United States and Canada with respect to taxes on income and on capital.]

The foregoing paragraph was deleted by Article XIII of the First Protocol and replaced by the following:

6. Notwithstanding any other provision of the Convention,
 - (a) Where profits, income or gains derived by a trust is to be treated for the purposes of the Convention as income of a resident of a Contracting State, and a principal purpose for the establishment, acquisition or maintenance of the trust was to obtain a benefit under the Convention or the 1942 Convention for persons who are not residents of that State, Articles VI (Income from Real Property) through XXIV (Elimination of Double Taxation) shall not apply to profits, income or gains of the trust; and
 - (b) Articles VI (Income from Real Property) through XXIV (Elimination of Double Taxation) shall not apply to non-resident-owned investment corporations as defined under section 133 of the *Income Tax Act* of Canada, or under any similar provision enacted by Canada after the date of signature of the Protocol.
7. One-half of the total amount of benefits under the social security legislation in Canada paid in a taxable year to a resident of Canada who is a citizen of the United States shall be exempt from taxation in the United States.

The foregoing paragraph 7 was added by Article II of the Second Protocol.

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Note: Paragraphs 3(a), 5, 6, and 7 have been deleted and replaced by Article 17 of the Third Protocol.

Article XXIXA

Limitation on Benefits

This is a new Article added by Article 18 of the Third Protocol.

Article XXIX B

Taxes Imposed by Reason of Death

This is a new Article added by Article 19 of the Third Protocol.

Article XXX

Entry into Force

1. This Convention shall be subjected to ratification in accordance with the applicable procedures of each Contracting State and instruments of ratification shall be exchanged at _____ as soon as possible.
2. The Convention shall enter into force upon the exchange of instruments of ratification and, subject to the provisions of paragraph 3, its provisions shall have effect:
 - (a) For tax withheld at the source on income referred to in Articles X (Dividends), XI (Interest), XII (Royalties) and XVIII (Pensions and Annuities), with respect to amounts paid or credited on or after the first day of the second month next following the date on which the Convention enters into force;
 - (b) For other taxes, with respect to taxable years beginning on or after the first day of January next following the date on which the Convention enters into force; and
 - (c) Notwithstanding the provisions of subparagraph (b), for the taxes covered by paragraph 4 of Article XXIX (Miscellaneous Rules) with respect to all taxable years referred to in that paragraph.
- [3. For the purposes of applying the United States foreign tax credit in relation to taxes paid or accrued to Canada:
 - (a) Notwithstanding the provisions of paragraph 2(a) of Article II (Taxes Covered), the tax on 1971 undistributed income on hand imposed by Part IX of the Income Tax Act of Canada shall be considered to be an income tax for distributions made on or after the first day of January 1972 and before the first day of January 1979, and shall be considered imposed upon the recipient of a distribution, in the proportion that the distribution out of undistributed income with respect to which the tax has been paid bears to 85 per cent of such undistributed income; and
 - (b) The principles of paragraph 6 of Article XXIV (Elimination of Double Taxation) shall have effect for taxable years beginning on or after the first day of January 1976.

Any claim for refund based on the provisions of this paragraph may be filed on or

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before June 30 of the calendar year following that in which the Convention enters into force, notwithstanding any rule of domestic law to the contrary.]

The foregoing paragraph was deleted by Article XIV of the First Protocol and replaced by the following:

3. For the purposes of applying the United States foreign tax credit in relation to taxes paid or accrued to Canada:

- (a) Notwithstanding the provisions of paragraph 2(a) of Article II (Taxes Covered) the tax on 1971 undistributed income on hand imposed by Part IX of the *Income Tax Act* of Canada shall be considered to be an income tax for distributions made on or after the first day of January 1972 and before the first day of January 1979 and shall be considered to be imposed upon the recipient of a distribution, in the proportion that the distribution out of undistributed income with respect to which the tax has been paid bears to 85 per cent of such undistributed income;
- (b) The principles of paragraph 6 of Article XXIV (Elimination of Double Taxation) shall have effect for taxable years beginning on or after the first day of January 1976; and
- (c) The provisions of paragraph 1 of Article XXIV shall have effect for taxable years beginning on or after the first day of January 1981.

Any claim for refund based on the provisions of this paragraph may be filed on or before June 30 of the calendar year following that in which the Convention enters into force, notwithstanding any rule of domestic law to the contrary.

4. Subject to the provisions of paragraph 5, the 1942 Convention shall cease to have effect for taxes for which this Convention has effect in accordance with the provisions of paragraph 2.
5. Where any greater relief from tax would have been afforded by any provision of the 1942 Convention than under this Convention, any such provision shall continue to have effect for the first taxable year with respect to which the provisions of this Convention have effect under paragraph 2(b).
6. The 1942 Convention shall terminate on the last date on which it has effect in accordance with the preceding provisions of this Article.
7. The Exchange of Notes between the United States and Canada dated August 2 and September 17, 1928, providing for relief from double income taxation on shipping profits, is terminated. Its provisions shall cease to have effect with respect to taxable years beginning on or after the first day of January next following the date on which this Convention enters into force.
8. The provisions of the Convention between the Government of Canada and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on the Estates of Deceased Persons signed at Washington on February 17, 1961 shall continue to have effect with respect to estates of persons deceased prior to the first day of January next following the date on which this Convention enters into force but shall cease to have effect with respect to estates of persons deceased on or after that date. Such Convention shall terminate on the last date on which it has effect in accordance with the preceding sentence.

Note: Article 20 of the Third Protocol is new, and states that the appropriate authorities of the two Contracting States shall consult within a three-year period from the date

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on which the Protocol enters into force, to discuss further reductions in withholding taxes and also the rules in Article XXIX A and in Article XXVI.

Article 21 of the Third Protocol covers its ratification procedure and when the withholding taxes become effective.

Article XXXI

Termination

1. This Convention shall remain in force until terminated by a Contracting State.

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2. Either Contracting State may terminate the Convention at any time after 5 years from the date on which the Convention enters into force provided that at least 6 months' prior notice of termination has been given through diplomatic channels.
3. Where a Contracting State considers that a significant change introduced in the taxation laws of the other Contracting State should be accommodated by a modification of the Convention, the Contracting States shall consult together with a view to resolving the matter; if the matter cannot be satisfactorily resolved, the first-mentioned State may terminate the Convention in accordance with the procedures set forth in paragraph 2, but without regard to the 5 year limitation provided therein.
4. In the event the Convention is terminated, the Convention shall cease to have effect:
 - (a) For tax withheld at the source on income referred to in Articles X (Dividends), XI (Interest), XII (Royalties), XVIII (Pensions and Annuities) and paragraph 2 of Article XXII (Other Income), with respect to amounts paid or credited on or after the first day of January next following the expiration of the 6 months' period referred to in paragraph 2; and
 - (b) For other taxes, with respect to taxable years beginning on or after the first day of January next following the expiration of the 6 months' period referred to in paragraph 2.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE in two copies at Washington this twenty-sixth day of September, 1980, in the French and English languages, each text being equally authentic.

FOR THE GOVERNMENT
OF CANADA:
ALLAN J. MacEACHEN

FOR THE GOVERNMENT OF THE
UNITED STATES OF AMERICA:
G. WILLIAM MILLER

Excellency:

I have the honor to refer to the Convention between the United States of America and Canada with Respect to Taxes on Income and on Capital, signed today, and to confirm certain understandings reached between the two Governments with respect to the Convention.

1. In French, the term "société" also means a "corporation" within the meaning of Canadian law.
2. The competent authorities of each of the Contracting States shall review the procedures and requirements for an organization of the other Contracting State to establish its status as a religious, scientific, literary, educational or charitable organization entitled to exemption under paragraph 1 of Article XXI (Exempt Organizations), or as an eligible recipient of the charitable contributions or gifts referred to in

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paragraphs 5 and 6 of Article XXI, with a view to avoiding duplicate application by such organizations to the administering agencies of both Contracting States. If a Contracting State determines that the other Contracting State maintains procedures to determine such status and rules for qualification that are compatible with such procedures and rules of the first-mentioned Contracting State, it is contemplated that such first-mentioned Contracting State shall accept the certification of the administering agency of the other Contracting State as to such status for the purpose of making the necessary determinations under paragraphs 1, 5 and 6 of Article XXI.

It is further agreed that the term "family," as used in paragraphs 5 and 6 of Article XXI, means an individual's brothers and sisters (whether by whole or half-blood, or by adoption), spouse, ancestors, lineal descendants and adopted descendants.

3. It is the position of Canada that the so-called "unitary apportionment" method used by certain states of the United States to allocate income to United States offices or subsidiaries of Canadian companies results in inequitable taxation and imposes excessive administrative burdens on Canadian companies doing business in those states. Under that method the profit of a Canadian company on its United States business is not determined on the basis of arm's-length relations but is derived from a formula taking account of the income of the Canadian company and its worldwide subsidiaries as well as the assets, payroll and sales of all such companies. For a Canadian multinational company with many subsidiaries in different countries to have to submit its books and records for all of these companies to a state of the United States imposes a costly burden. It is understood that the Senate of the United States has not consented to any limitation on the taxing jurisdiction of the states by a treaty and that a provision which would have restricted the use of unitary apportionment in the case of United Kingdom corporations was recently rejected by the Senate. Canada continues to be concerned about this issue as it affects Canadian multinationals. If an acceptable provision on this subject can be devised, the United States agrees to reopen discussions with Canada on this subject.

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UNITED STATES PROTOCOL

Schedule II

Protocol Amending the Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital Signed at Washington on September 26, 1980

Canada and the United States of America,

Desiring to conclude a Protocol to amend the Convention with respect to Taxes on Income and on Capital signed at Washington on September 26, 1980 (hereinafter referred to as "the Convention"),

Have agreed as follows:

Article I

Subparagraph 1(h) of Article III (General Definitions) of the Convention shall be deleted and replaced by the following:

"(h) The term "international traffic" with reference to a resident of a Contracting State means any voyage of a ship or aircraft to transport passengers or property (whether or not operated or used by that resident) except where the principal purpose of the voyage is to transport passengers or property between places within the other Contracting State;"

Article II

Paragraph 4 of Article V (Permanent Establishment) shall be deleted and replaced by the following:

"4. The use of an installation or drilling rig or ship in a Contracting State to explore for or exploit natural resources constitutes a permanent establishment if, but only if, such use is for more than three months in any twelve-month period."

Article III

Article VI (Income from Real Property) shall be deleted and replaced by the following:

- "1. Income derived by a resident of a Contracting State from real property (including income from agriculture, forestry or other natural resources) situated in the other Contracting State may be taxed in that other State.
2. For the purposes of this Convention, the term "real property" shall have the meaning which it has under the taxation laws of the Contracting State in which the property in question is situated and shall include any option or similar right in respect thereof. The term shall in any case include usufruct of real property, rights to explore for or to exploit mineral deposits, sources and other natural resources and rights to amounts computed by reference to the amount or value of production from such resources; ships and aircraft shall not be regarded as real property.
3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting or use in any other form of real property and to income from the alienation of such property."

Article IV

Paragraph 1 of Article VIII (Transportation) shall be deleted and replaced by the following:

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- "1. Notwithstanding the provisions of Articles VII (Business Profits), XII (Royalties) and XIII (Gains), profits derived by a resident of a Contracting State from the operation of ships or aircraft in international traffic, and gains derived by a resident of a Contracting State from the alienation of ships, aircraft or containers (including trailers and related equipment for the transport of containers) used principally in international traffic, shall be exempt from tax in the other Contracting State."

Article V

1. Paragraph 3 of Article XII (Royalties) shall be deleted and replaced by the following:

"3. Notwithstanding the provisions of paragraph 2, copyright royalties and other like payments in respect of the production or reproduction of any literary, dramatic, musical or artistic work (but not including royalties in respect of motion pictures and works on film, videotape or other means of reproduction for use in connection with television) arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State."

2. Paragraph 4 of Article XII (Royalties) shall be deleted and replaced by the following:

"4. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work (including motion pictures and works on film, videotape or other means of reproduction for use in connection with television), any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, tangible personal property or for information concerning industrial, commercial or scientific experience, and, notwithstanding the provisions of Article XIII (Gains), includes gains from the alienation of any intangible property or rights described in this paragraph to the extent that such gains are contingent on the productivity, use or subsequent disposition of such property or rights."

3. Subparagraph 6(b) of Article XII (Royalties) shall be deleted and replaced by the following:

"(b) Where the royalties are for the use of, or the right to use, intangible property or tangible personal property in a Contracting State, then such royalties shall be deemed to arise in that State and not in the State of which the payer is a resident."

Article VI

1. Paragraph 3 of Article XIII (Gains) shall be deleted and replaced by the following:

"3. For the purposes of this Article the term "real property situated in the other Contracting State"

(a) In the case of real property situated in the United States, means a United States real property interest and real property referred to in Article VI (Income from Real Property) situated in the United States; and

(b) In the case of real property situated in Canada means:

(i) Real property referred to in Article VI (Income from Real Property) situated in Canada;

(ii) A share of the capital stock of a company, the value of whose shares is derived principally from real property situated in Canada; and

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- (iii) An interest in a partnership, trust or estate, the value of which is derived principally from real property situated in Canada."
2. Paragraph 5 of Article XIII (Gains) shall be deleted and replaced by the following:
- "5. The provisions of paragraph 4 shall not affect the right of a Contracting State to levy tax on gains from the alienation of property derived by an individual who is a resident of the other Contracting State if such individual:
- (a) Was a resident of the first-mentioned State for 120 months during any period of 20 consecutive years preceding the alienation of the property; and
 - (b) Was a resident of the first-mentioned State at any time during the ten years immediately preceding the alienation of the property; and if such property (or property for which such property was substituted in an alienation the gain on which was not recognized for the purposes of taxation in the first-mentioned State) was owned by the individual at the time he ceased to be a resident of the first-mentioned State."
3. Paragraph 9 of Article XIII (Gains) shall be deleted and replaced by the following:
- "9. Where a person who is a resident of a Contracting State alienates a capital asset which may in accordance with this Article be taxed in the other Contracting State and
- (a) That person owned the asset on September 26, 1980 and was resident in the first-mentioned State on that date; or
 - (b) The asset was acquired by that person in an alienation of property which qualified as a non-recognition transaction for the purposes of taxation in that other State;
- the amount of the gain which is liable to tax in that other State in accordance with this Article shall be reduced by the proportion of the gain attributable on a monthly basis to the period ending on December 31 of the year in which the Convention enters into force, or such greater portion of the gain as is shown to the satisfaction of the competent authority of the other State to be reasonably attributable to that period. For the purposes of this paragraph the term "non-recognition transaction" includes a transaction to which paragraph 8 applies and, in the case of taxation in the United States, a transaction that would have been a non-recognition transaction but for Sections 897(d) and 897(e) of the Internal Revenue Code. The provisions of this paragraph shall not apply to
- (c) An asset that on September 26, 1980 formed part of the business property of a permanent establishment or pertained to a fixed base of a resident of a Contracting State situated in the other Contracting State;
 - (d) An alienation by a resident of a Contracting State of an asset that was owned at any time after September 26, 1980 and before such alienation by a person who was not at all times after that date while the asset was owned by such person a resident of that State; or
 - (e) An alienation of an asset that was acquired by a person at any time after September 26, 1980 and before such alienation in a transaction other than a non-recognition transaction."

Article VII

1. Paragraph 3 of Article XVI (Artistes and Athletes) shall be deleted and replaced by the following:
- "3. The provisions of paragraphs 1 and 2 shall not apply to the income of:

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- (a) An athlete in respect of his activities as an employee of a team which participates in a league with regularly scheduled games in both Contracting States; or
 - (b) A team described in subparagraph (a)."
2. There shall be added to Article XVI (Artistes and Athletes) a new paragraph 4, as follows:

"4. Notwithstanding the provisions of Articles XIV (Independent Personal Services) and XV (Dependent Personal Services) an amount paid by a resident of a Contracting State to a resident of the other Contracting State as an inducement to sign an agreement relating to the performance of the services of an athlete (other than an amount referred to in paragraph 1 of Article XV (Dependent Personal Services)) may be taxed in the first-mentioned State, but the tax so charged shall not exceed 15 per cent of the gross amount of such payment."

Article VIII

1. The Title of Article XVII shall be deleted and replaced by the following:
- "Withholding of Taxes in Respect of Personal Services"**
2. Paragraph 2 of Article XVII (Withholding of Taxes in Respect of Personal Services) shall be deleted and replaced by the following:

"2. Where the competent authority of a Contracting State considers that an amount that would otherwise be deducted or withheld from any amount paid or credited to an individual who is a resident of the other Contracting State in respect of the performance of personal services in the first-mentioned State is excessive in relation to the estimated tax liability for the taxable year of that individual in the first-mentioned State, it may determine that a lesser amount will be deducted or withheld."

Article IX

1. Paragraph 1 of Article XVIII (Pensions and Annuities) shall be deleted and replaced by the following:

"1. Pensions and annuities arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State, but the amount of any such pension that would be excluded from taxable income in the first-mentioned State if the recipient were a resident thereof shall be exempt from taxation in that other State."

2. Subparagraph 2(b) of Article XVIII (Pensions and Annuities) shall be deleted and replaced by the following:

"(b) Annuities may also be taxed in the Contracting State in which they arise and according to the laws of that State; but if a resident of the other Contracting State is the beneficial owner of an annuity payment, the tax so charged shall not exceed 15 per cent of the portion of such payment that would not be excluded from taxable income in the first-mentioned State if the beneficial owner were a resident thereof."

3. Paragraph 6 of Article XVIII (Pensions and Annuities) shall be deleted and replaced by the following:

"6. Alimony and other similar amounts (including child support payments) arising in a Contracting State and paid to a resident of the other Contracting State shall be taxable as follows:

- (a) Such amounts shall be taxable only in that other State;
- (b) Notwithstanding the provisions of subparagraph (a), the amount that would be excluded from taxable income in the first-mentioned State if

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the recipient were a resident thereof shall be exempt from taxation in that other State."

Article X

Paragraph 2 of Article XXI (Exempt Organizations) shall be deleted and replaced by the following:

"2. Subject to the provisions of paragraph 3, income referred to in Articles X (Dividends) and XI (Interest) derived by:

- (a) A trust, company or other organization which is resident in a Contracting State, generally exempt from tax in a taxable year in that State and constituted and operated exclusively to administer or provide benefits under one or more funds or plans established to provide pension, retirement or other employee benefits; or
- (b) A trust, company or other organization which is resident in a Contracting State, not taxed in a taxable year in that State and constituted and operated exclusively to earn income for the benefit of an organization referred to in subparagraph (a); shall be exempt from tax in that taxable year in the other Contracting State "

Article XI

1. Paragraph 1 of Article XXIV (Elimination of Double Taxation) shall be deleted and replaced by the following:

"1. In the case of the United States, subject to the provisions of paragraphs 4, 5 and 6, double taxation shall be avoided as follows: In accordance with the provisions and subject to the limitations of the law of the United States (as it may be amended from time to time without changing the general principle hereof), the United States shall allow to a citizen or resident of the United States, or to a company electing to be treated as a domestic corporation, as a credit against the United States tax on income the appropriate amount of income tax paid or accrued to Canada; and, in the case of a company which is a resident of the United States owning at least 10 per cent of the voting stock of a company which is a resident of Canada from which it receives dividends in any taxable year, the United States shall allow as a credit against the United States tax on income the appropriate amount of income tax paid or accrued to Canada by that company with respect to the profits out of which such dividends are paid."

2. Paragraph 2 of Article XXIV (Elimination of Double Taxation) shall be deleted and replaced by the following:

"2. In the case of Canada, subject to the provisions of paragraphs 4, 5 and 6, double taxation shall be avoided as follows:

- (a) Subject to the provisions of the law of Canada regarding the deduction from tax payable in Canada of tax paid in a territory outside Canada and to any subsequent modification of those provisions (which shall not affect the general principle hereof), and unless a greater deduction or relief is provided under the law of Canada, income tax paid or accrued to the United States on profits, income or gains arising in the United States shall be deducted from any Canadian tax payable in respect of such profits, income or gains;
- (b) Subject to the provisions of the law of Canada regarding the determination of the exempt surplus of a foreign affiliate and to any subse-

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quent modification of those provisions (which shall not affect the general principle hereof), for the purposes of computing Canadian tax, a company which is a resident of Canada shall be allowed to deduct in computing its taxable income any dividend received by it out of the exempt surplus of a foreign affiliate which is a resident of the United States; and

- (c) Notwithstanding the provisions of subparagraph (a), where Canada imposes a tax on gains from the alienation of property that, but for the provisions of paragraph 5 of Article XIII (Gains), would not be taxable in Canada, income tax paid or accrued to the United States on such gains shall be deducted from any Canadian tax payable in respect of such gains."

3. There shall be added to Article XXIV (Elimination of Double Taxation) a new paragraph 9, as follows:

- "9. The provisions of this Article relating to the source of profits, income or gains shall not apply for the purpose of determining a credit against United States tax for any foreign taxes other than income taxes paid or accrued to Canada."

Article XII

Paragraph 6 of Article XXV (Non-Discrimination) shall be deleted and replaced by the following:

- "6. Notwithstanding the provisions of Article XXIV (Elimination of Double Taxation), the taxation on a permanent establishment which a resident of a Contracting State has in the other Contracting State shall not be less favorably levied in the other State than the taxation levied on residents of the other State carrying on the same activities. This paragraph shall not be construed as obliging a Contracting State:

- (a) To grant to a resident of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents; or
- (b) To grant to a company which is a resident of the other Contracting State the same tax relief that it provides to a company which is a resident of the first-mentioned State with respect to dividends received by it from a company."

Article XIII

1. Paragraph 2 of Article XXIX (Miscellaneous Rules) shall be deleted and replaced by the following:

- "2. Except as provided in paragraph 3, nothing in the Convention shall be construed as preventing a Contracting State from taxing its residents (as determined under Article IV (Residence)) and, in the case of the United States, its citizens (including a former citizen whose loss of citizenship had as one of its principal purposes the avoidance of tax, but only for a period of ten years following such loss) and companies electing to be treated as domestic corporations, as if there were no convention between the United States and Canada with respect to taxes on income and on capital."

2. Subparagraph 3(a) of Article XXIX (Miscellaneous Rules) shall be deleted and replaced by the following:

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"(a) Under paragraphs 3 and 4 of Article IX (Related Persons), paragraphs 6 and 7 of Article XIII (Gains), paragraphs 1, 3, 4, 5 and 6(b) of Article XVIII (Pensions and Annuities), paragraph 5 of Article XXIX (Miscellaneous Rules), paragraphs 3 and 5 of Article XXX (Entry into Force), and Articles XIX (Government Service), XXI (Exempt Organizations), XXIV (Elimination of Double Taxation), XXV (Non-Discrimination) and XXVI (Mutual Agreement Procedure); and"

3. Paragraph 4 of Article XXIX (Miscellaneous Rules) shall be deleted and replaced by the following:

"4. With respect to taxable years not barred by the statute of limitations ending on or before December 31 of the year before the year in which the Social Security Agreement between Canada and the United States (signed in Ottawa on March 11, 1981) enters into force, income from personal services not subject to tax by the United States under this Convention or the 1942 Convention shall not be considered wages or net earnings from self-employment for purposes of social security taxes imposed under the Internal Revenue Code."

4. Paragraph 5 of Article XXIX (Miscellaneous Rules) shall be deleted and replaced by the following:

"5. A beneficiary of a Canadian registered retirement savings plan may elect, under rules established by the competent authority of the United States, to defer United States taxation with respect to any income accrued in the plan but not distributed by the plan, until such time as a distribution is made from such plan, or any plan substituted therefor. The provisions of the preceding sentence shall not apply to income which is reasonably attributable to contributions made to the plan by the beneficiary while he was not a resident of Canada."

5. Paragraph 6 of Article XXIX (Miscellaneous Rules) shall be deleted and replaced by the following:

"6. Notwithstanding any other provision of the Convention,

(a) Where profits, income or gains derived by a trust is to be treated for the purposes of the Convention as income of a resident of a Contracting State, and a principal purpose for the establishment, acquisition or maintenance of the trust was to obtain a benefit under the Convention or the 1942 Convention for persons who are not residents of that State, Articles VI (Income from Real Property) through XXIV (Elimination of Double Taxation) shall not apply in relation to the profits, income or gains of the trust; and

(b) Articles VI (Income from Real Property) through XXIV (Elimination of Double Taxation) shall not apply to non-resident-owned investment corporations as defined under section 133 of the Income Tax Act of Canada, or under any similar provision enacted by Canada after the date of signature of the Protocol."

Article XIV

Paragraph 3 of Article XXX (Entry into Force) shall be deleted and replaced by the following:

"3. For the purposes of applying the United States foreign tax credit in relation to taxes paid or accrued to Canada:

(a) Notwithstanding the provisions of paragraph 2(a) of Article II (Taxes Covered), the tax on 1971 undistributed income on hand imposed by Part IX of the Income Tax Act of Canada shall be considered to be an income tax for distributions made on or after the first day of January

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1972 and before the first day of January 1979 and shall be considered to be imposed upon the recipient of a distribution, in the proportion that the distribution out of undistributed income with respect to which the tax has been paid bears to 85 per cent of such undistributed income;

- (b) The principles of paragraph 6 of Article XXIV (Elimination of Double Taxation) shall have effect for taxable years beginning on or after the first day of January 1976; and
- (c) The provisions of paragraph 1 of Article XXIV shall have effect for taxable years beginning on or after the first day of January 1981.

Any claim for refund based on the provisions of this paragraph may be filed on or before June 30 of the calendar year following that in which the Convention enters into force, notwithstanding any rule of domestic law to the contrary."

Article XV

1. This protocol shall be subject to ratification in accordance with the applicable procedures of Canada and the United States and instruments of ratification shall be exchanged at Washington as soon as possible.

2. The Protocol shall enter into force upon the exchange of instruments of ratification and shall have effect in accordance with Article XXX (Entry into Force) of the Convention.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Protocol.

Done in two copies at Ottawa this 14th day of June, 1983, in the English and French languages, each text being equally authentic.

FOR THE GOVERNMENT OF CANADA:
MARC LALONDE

FOR THE GOVERNMENT OF THE
UNITED STATES OF AMERICA:
PAUL ROBINSON

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Schedule III

SECOND PROTOCOL

Amending the Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital Signed at Washington on September 26, 1980, as Amended by the Protocol Signed at Ottawa on June 14, 1983

Canada and the United States of America, desiring to conclude a second Protocol to amend the Convention with respect to Taxes on Income and on Capital signed at Washington on September 26, 1980, as amended by the Protocol signed at Ottawa on June 14, 1983 (hereinafter referred to as "the Convention"),

Have agreed as follows:

Article I

Paragraph 5 of Article XVIII (Pensions and Annuities) of the Convention shall be deleted and replaced by the following:

"5. Benefits under the social security legislation in a Contracting State paid to a resident of the other Contracting State shall be taxable as follows:

- (a) Such benefits shall be taxable only in that other State;
- (b) Notwithstanding the provisions of subparagraph (a), one-half of the total amount of any such benefit paid in a taxable year shall be exempt from taxation in that other State."

Article II

1. Subparagraph 3(a) of Article XXIX (Miscellaneous Rules) of the Convention shall be deleted and replaced by the following:

"(a) Under paragraphs 3 and 4 of Article IX (Related Persons), paragraphs 6 and 7 of Article XIII (Gains), paragraphs 1, 3, 4, 5(b) and 6(b) of Article XVIII (Pensions and Annuities), paragraphs 5 and 7 of Article XXIX (Miscellaneous Rules), paragraphs 3 and 5 of Article XXX (Entry into Force), and Articles XIX (Government Service), XXI (Exempt Organizations), XXIV (Elimination of Double Taxation), XXV (Non-Discrimination) and XXVI (Mutual Agreement Procedure); and"

2. There shall be added to Article XXIX (Miscellaneous Rules) of the Convention a new paragraph 7, as follows:

"7. One-half of the total amount of benefits under the social security legislation in Canada paid in a taxable year to a resident of Canada who is a citizen of the United States shall be exempt from taxation in the United States."

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Article III

1. This Protocol shall be subject to ratification in accordance with the applicable procedures of Canada and the United States and instruments of ratification shall be exchanged as soon as possible.
2. The Protocol shall enter into force upon the exchange of instruments of ratification and shall have effect in accordance with the provisions of Article XXX (Entry into Force) of the Convention.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Protocol.

Done in two copies at Washington this 28th day of March, 1984 in the English and French languages, each text being equally authentic.

FOR THE GOVERNMENT OF CANADA:
ALLAN E. GOTLIEB

FOR THE GOVERNMENT OF THE
UNITED STATES OF AMERICA:
KENNETH W. DAM

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THIRD PROTOCOL

In News Release 94-076, dated August 31, 1994, Finance Minister Paul Martin announced that a third Protocol amending the Convention between Canada and the United States of America with respect to taxes on income and on capital signed on September 26, 1980, as amended by the Protocols signed on June 14, 1983 and March 28, 1984, was signed today at Washington.

Mr. Martin indicated that the reduction of the rate of withholding tax on interest, direct dividends and certain royalties to 10 percent, 5 percent and 0 percent respectively bring these rates into line with those provided in the OECD Model Tax Convention and accepted by a majority of the 25 Member countries of that organization. These reduced rates will facilitate trade and investment between Canada and the United States. The Minister emphasized that the elimination of the tax on royalties for patent and technological information and computer software payments will have the important effect of reducing the cost to Canadian companies of imported technology and know-how from the United States.

The Minister indicated that a significant benefit is provided under the Protocol for Canadians who die owning U.S. real estate or other U.S. property. Under the existing U.S. law, as enacted in 1988, Canadians with U.S. property having a value of more than \$60,000 U.S. may be subject to U.S. estate taxes. Under the Protocol, Canadian residents will generally be entitled to treatment that is not less favourable than that available to U.S. citizens. As a result, Canadians will not be subject to U.S. estate tax unless the value of the individual's worldwide gross estate exceeds \$600,000 U.S. In addition, a special marital credit will be available with respect to property transferred to the spouse of the deceased. Moreover, Canada has agreed to provide a credit against its tax arising in the year of death on U.S. source income for any U.S. estate tax payable. These provisions will be effective retroactively for deaths occurring after November 10, 1988 — the date on which the major changes to the U.S. estate tax affecting Canadian residents were introduced.

The Minister also noted that another change will affect the taxation of social security benefits paid to non-residents. Under the existing Convention, payments under the social security legislation of one country are not taxable in the other country. Under the Protocol, social security benefits paid from one country will be taxable exclusively in that country and will no longer be subject to tax in the other country. This means that persons who have retired in the United States will no longer be subject to U.S. tax on their Old Age Security benefits or payments under the Canada or Quebec Pension Plan. The Minister announced his intention of proposing amendments to the *Income Tax Act* to extend the 25 percent non-resident withholding tax to such payments effective January 1, 1995. He noted also that the existing provisions of that Act will allow a reduction of such taxes for those persons with relatively modest amounts of Canadian source taxable income. Detailed information relating to persons that may qualify for this reduction and how to make application for it will be provided to all non-residents in receipt of OAS and CPP/QPP benefits.

The Minister also indicated that it was the Government's intention to introduce the required legislation in Parliament in the fall to implement the Protocol, and hoped to have its provisions become effective as of January 1, 1995. Mr. Martin's hope for a Happy New Year's Day was dashed. As can be seen from the text of his December 8 announcement (text reproduced on page 17,231) there will be a one-year's delay.

As it happens, Mr. Martin announced on March 17, 1995, that a revised Third Protocol was signed in Washington that day. The full text of the News Release (95-026) follows.

TAX AGREEMENTS AND CONVENTIONS

TECHNICAL REVISION OF THE PROTOCOL SIGNED ON AUGUST 31, 1994, AMENDING THE CANADA-UNITED STATES INCOME TAX TREATY

Finance Minister Paul Martin today announced that a revised Protocol amending the Convention between Canada and the United States with respect to taxes on income and on capital signed on September 26, 1980, as amended by the Protocols signed on June 14, 1983 and March 28, 1984, was signed today at Washington.

The revised Protocol is identical to that signed by the two countries on August 31, 1994, with the exception of a limited number of technical changes made to clarify the application of the rules dealing with taxes arising on death, and to change the date of application of some of the provisions of the Protocol to reflect the fact that the Protocol signed last year was not ratified in 1994 as had been expected. The full text of the revised Protocol signed today is attached; the provisions which differ from the Protocol signed in August 1994 are indicated by a line in the margin.

The Minister expressed his desire to introduce the legislation required to implement the new Protocol during the current session of Parliament. He also noted that, as a result of the Protocol signed today, both Canada and the United States will not pursue the implementation of the Protocol as signed on August 31, 1994.

For further information:

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Protocol Signed March 17, 1995, amending the Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital Signed on June 14, 1983 and March 28, 1984

Canada and the United States of America, desiring to conclude a Protocol to amend the Convention with Respect to Taxes on Income and on Capital signed at Washington on September 26, 1980, as amended by the Protocols signed on June 14, 1983, March 28, 1984 and March 17, 1995 (hereinafter referred to as "the Convention"), have agreed as follows:

Article 1

1. Paragraphs 2 to 4 of Article II (Taxes Covered) of the Convention shall be deleted and replaced by the following:

"2. Notwithstanding paragraph 1, the taxes existing on March 17, 1995 to which the Convention shall apply are:

(a) In the case of Canada, the taxes imposed by the Government of Canada under the *Income Tax Act*; and

(b) In the case of the United States, the Federal income taxes imposed by the Internal Revenue Code of 1986. However, the Convention shall apply to:

(i) The United States accumulated earnings tax and personal holding company tax, to the extent, and only to the extent, necessary to implement the provisions of paragraphs 5 and 8 of Article X (Dividends);

(ii) The United States excise taxes imposed with respect to private foundations, to the extent, and only to the extent, necessary to implement the provisions of paragraph 4 of Article XXI (Exempt Organizations);

(iii) The United States social security taxes, to the extent, and only to the extent, necessary to implement the provisions of paragraph 2 of Article XXIV (Elimination of Double Taxation) and paragraph 4 of Article XXIX (Miscellaneous Rules); and

(iv) The United States estate taxes imposed by the Internal Revenue Code of 1986, to the extent, and only to the extent, necessary to implement the provisions of paragraph 3(g) of Article XXVI (Mutual Agreement Procedure) and Article XXIX B (Taxes Imposed by Reason of Death).

3. The Convention shall apply also to:

(a) Any taxes identical or substantially similar to those taxes to which the Convention applies under paragraph 2; and

(b) Taxes on capital;

which are imposed after March 17, 1995 in addition to, or in place of, the taxes to which the Convention applies under paragraph 2."

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Article 2

Subparagraphs (c) and (d) of paragraph 1 of Article III (General Definitions) of the Convention shall be deleted and replaced by the following:

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- "(c) The term "Canadian tax" means the taxes referred to in Article II (Taxes Covered) that are imposed on income by Canada;
- (d) The term "United States tax" means the taxes referred to in Article II (Taxes Covered), other than in subparagraph (b)(i) to (iv) of paragraph 2 thereof, that are imposed on income by the United States;"

Article 3

1. Paragraph 1 of Article IV (Residence) of the Convention shall be deleted and replaced by the following:

"1. For the purposes of this Convention, the term "resident" of a Contracting State means any person that, under the laws of that State, is liable to tax therein by reason of that person's domicile, residence, citizenship, place of management, place of incorporation or any other criterion of a similar nature, but in the case of an estate or trust, only to the extent that income derived by the estate or trust is liable to tax in that State, either in its hands or in the hands of its beneficiaries. For the purposes of this paragraph, an individual who is not a resident of Canada under this paragraph and who is a United States citizen or an alien admitted to the United States for permanent residence (a "green card" holder) is a resident of the United States only if the individual has a substantial presence, permanent home or habitual abode in the United States, and that individual's personal and economic relations are closer to the United States than to any third State. The term "resident" of a Contracting State is understood to include:

(a) The Government of that State or a political subdivision or local authority thereof or any agency or instrumentality of any such government, subdivision or authority, and

(b) (i) A trust, organization or other arrangement that is operated exclusively to administer or provide pension, retirement or employee benefits; and

(ii) A not-for-profit organization

that was constituted in that State and that is, by reason of its nature as such, generally exempt from income taxation in that State."

2. A new sentence shall be added at the end of paragraph 3 of Article IV (Residence) of the Convention as follows:

"Notwithstanding the preceding sentence, a company that was created in a Contracting State, that is a resident of both Contracting States and that is continued at any time in the other Contracting State in accordance with the corporate law in that other State shall be deemed while it is so continued to be a resident of that other State."

Article 4

- Paragraphs 3 and 4 of the Article IX (Related Persons) of the Convention shall be deleted and replaced by the following:

"3. Where an adjustment is made or to be made by a Contracting State in accordance with paragraph 1, the other Contracting State shall (notwithstanding any time or procedural limitations in the domestic law of that other State) make a corresponding adjustment to the income, loss or tax of the related person in that other State if:

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- (a) It agrees with the first-mentioned adjustment; and
 - (b) Within six years from the end of the taxable year to which the first-mentioned adjustment relates, the competent authority of the other State has been notified of the first-mentioned adjustment. The competent authorities, however, may agree to consider cases where the corresponding adjustment would not otherwise be barred by any time or procedural limitations in the other State, even if the notification is not made within the six-year period.
4. In the event that the notification referred to in paragraph 3 is not given within the time period referred to therein, and the competent authorities have not agreed to otherwise consider the case in accordance with paragraph 3(b), the competent authority of the Contracting State which has made or is to make the first-mentioned adjustment may provide relief from double taxation where appropriate."

Article 5

1. The references in paragraphs 2(a) and 6 of Article X (Dividends) of the Convention to a rate of tax of "10 per cent" shall be deleted and replaced by references to a rate of tax of "5 per cent".
2. Paragraph 7 of Article X (Dividends) of the Convention shall be deleted and replaced by the following:

"7. Notwithstanding the provisions of paragraph 2,

 - (a) Dividends paid by a company that is a resident of Canada and a non-resident-owned investment corporation to a company that is a resident of the United States, that owns at least 10 per cent of the voting stock of the company paying the dividends and that is the beneficial owner of such dividends, may be taxed in Canada at a rate not exceeding 10 per cent of the gross amount of the dividends;
 - (b) Paragraph 2(b) and not paragraph 2(a) shall apply in the case of dividends paid by a resident of the United States that is a Regulated Investment Company; and
 - (c) Paragraph 2(a) shall not apply to dividends paid by a resident of the United States that is a Real Estate Investment Trust, and paragraph 2(b) shall apply only where such dividends are beneficially owned by an individual holding an interest of less than 10 per cent in the trust; otherwise the rate of tax applicable under the domestic law of the United States shall apply. Where an estate or a testamentary trust acquired its interest in a Real Estate Investment Trust as a consequence of an individual's death, for the purposes of the preceding sentence the estate or trust shall for the five-year period following the death be deemed with respect to that interest to be an individual."

Article 6

1. The reference in paragraph 2 of Article XI (Interest) of the Convention to "15 per cent" shall be deleted and replaced by a reference to "10 per cent".
2. Paragraph 3(d) of Article XI (Interest) of the Convention shall be deleted and replaced by the following:

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"(d) The interest is beneficially owned by a resident of the other Contracting State and is paid with respect to indebtedness arising as a consequence of the sale on credit by a resident of that other State of any equipment, merchandise or services except where the sale or indebtedness was between related persons; or"

3. A new paragraph 9 shall be added to Article XI (Interest) of the Convention as follows:

"9. The provisions of paragraphs 2 and 3 shall not apply to an excess inclusion with respect to a residual interest in a Real Estate Mortgage Investment Conduit to which Section 860G of the United States Internal Revenue Code, as it may be amended from time to time without changing the general principle thereof, applies."

Article 7

1. Paragraph 3 of Article XII (Royalties) of the Convention shall be deleted and replaced by the following:

"3. Notwithstanding the provisions of paragraph 2,

(a) Copyright royalties and other like payments in respect of the production or reproduction of any literary, dramatic, musical or artistic work (other than payments in respect of motion pictures and works on film, videotape or other means of reproduction for use in connection with television);

(b) Payments for the use of, or the right to use, computer software;

(c) Payments for the use of, or the right to use, any patent or any information concerning industrial, commercial or scientific experience (but not including any such information provided in connection with a rental or franchise agreement); and

(d) Payments with respect to broadcasting as may be agreed for the purposes of this paragraph in an exchange of notes between the Contracting States;

arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State."

2. Paragraph 6 of Article XII (Royalties) of the Convention shall be deleted and replaced by the following:

"6. For the purposes of this Article,

(a) Royalties shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying the royalties, whether he is a resident of a Contracting State or not, has in a State a permanent establishment or a fixed base in connection with which the obligation to pay the royalties was incurred, and such royalties are borne by such permanent establishment or fixed base, then such royalties shall be deemed to arise in the State in which the permanent establishment or fixed base is situated and not in any other State of which the payer is a resident; and

(b) Where subparagraph (a) does not operate to treat royalties as arising in either Contracting State and the royalties are for the use of, or the right to use, intangible property or tangible property in a Contracting State, then such royalties shall be deemed to arise in that State."

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Article 8

Paragraph 8 of Article XIII (Gains) of the Convention shall be deleted and replaced by the following:

"8. Where a resident of a Contracting State alienates property in the course of a corporate or other organization, reorganization, amalgamation, division or similar transaction and profit, gain or income with respect to such alienation is not recognized for the purpose of taxation in that State, if requested to do so by the person who acquires the property, the competent authority of the other Contracting State may agree, in order to avoid double taxation and subject to terms and conditions satisfactory to such competent authority, to defer the recognition of the profit, gain or income with respect to such property for the purpose of taxation in that other State until such time and in such manner as may be stipulated in the agreement."

Article 9

1. Paragraph 3 of Article XVIII (Pensions and Annuities) of the Convention shall be deleted and replaced by the following:

"3. For the purposes of this Convention, the term "pensions" includes any payment under a superannuation, pension or other retirement arrangement, Armed Forces retirement pay, war veterans pensions and allowances and amounts paid under a sickness, accident or disability plan, but does not include payments under an income-averaging annuity contract or any benefit referred to in paragraph 5."

2. Paragraph 5 of Article XVIII (Pensions and Annuities) of the Convention shall be deleted and replaced by the following:

"5. Benefits under the social security legislation in a Contracting State (including tier 1 railroad benefits but not including unemployment benefits) paid to a resident of the other Contracting State (and in the case of Canadian benefits, to a citizen of the United States) shall be taxable only in the first-mentioned State."

3. A new paragraph 7 shall be added to Article XVIII (Pensions and Annuities) of the Convention as follows:

"7. A natural person who is a citizen or resident of a Contracting State and a beneficiary of a trust, company, organization or other arrangement that is a resident of the other Contracting State, generally exempt from income taxation in that other State and operated exclusively to provide pension, retirement or employee benefits may elect to defer taxation in the first-mentioned State, under rules established by the competent authority of that State, with respect to any income accrued in the plan but not distributed by the plan, until such time as and to the extent that a distribution is made from the plan or any plan substituted therefor."

Article 10

1. Paragraphs 2 and 3 of Article XXI (Exempt Organizations) of the Convention shall be deleted and replaced by the following:

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"2. Subject to the provisions of paragraph 3, income referred to in Articles X (Dividends) and XI (Interest) derived by:

- (a) A trust, company, organization or other arrangement that is a resident of a Contracting State, generally exempt from income taxation in a taxable year in that State and operated exclusively to administer or provide pension, retirement or employee benefits; or
- (b) A trust, company, organization or other arrangement that is a resident of a Contracting State, generally exempt from income taxation in a taxable year in that State and operated exclusively to earn income for the benefit of an organization referred to in subparagraph (a);

shall be exempt from income taxation in that taxable year in the other Contracting State.

- 3. The provisions of paragraphs 1 and 2 shall not apply with respect to the income of a trust, company, organization or other arrangement from carrying on a trade or business or from a related person other than a person referred to in paragraph 1 or 2."
- 2. A new sentence shall be added at the end of paragraph 5 of Article XXI (Exempt Organizations) of the Convention as follows:

"For the purposes of this paragraph, a company that is a resident of Canada and that is taxable in the United States as if it were a resident of the United States shall be deemed to be a resident of the United States."
- 3. Paragraph 6 of Article XXI (Exempt Organizations) of the Convention shall be deleted and replaced by the following:

"6. For the purposes of Canadian taxation, gifts by a resident of Canada to an organization that is a resident of the United States, that is generally exempt from United States tax and that could qualify in Canada as a registered charity if it were a resident of Canada and created or established in Canada, shall be treated as gifts to a registered charity; however, no relief from taxation shall be available in any taxation year with respect to such gifts (other than such gifts to a college or university at which the resident or a member of the resident's family is or was enrolled) to the extent that such relief would exceed the amount of relief that would be available under the Income Tax Act if the only income of the resident for that year were the resident's income arising in the United States. The preceding sentence shall not be interpreted to allow in any taxation year relief from taxation for gifts to registered charities in excess of the amount of relief allowed under the percentage limitations of the laws of Canada in respect of relief for gifts to registered charities."

Article 11

A new paragraph 3 shall be added to Article XXII (Other Income) of the Convention as follows:

- "3. Losses incurred by a resident of a Contracting State with respect to wagering transactions the gains on which may be taxed in the other Contracting State shall, for the purpose of taxation in that other State, be deductible to the same extent that such losses would be deductible if they were incurred by a resident of that other State."

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Article 12

1. Paragraphs 2(a) and 2(b) of Article XXIV (Elimination of Double Taxation) of the Convention shall be deleted and replaced by the following:

"(a) Subject to the provisions of the law of Canada regarding the deduction from tax payable in Canada of tax paid in a territory outside Canada and to any subsequent modification of those provisions (which shall not affect the general principle hereof)

(i) Income tax paid or accrued to the United States on profits, income or gains arising in the United States, and

(ii) In the case of an individual, any social security taxes paid to the United States (other than taxes relating to unemployment insurance benefits) by the individual on such profits, income or gains

shall be deducted from any Canadian tax payable in respect of such profits, income or gains;

(b) Subject to the existing provisions of the law of Canada regarding the taxation of income from a foreign affiliate and to any subsequent modification of those provisions — which shall not affect the general principle hereof — for the purpose of computing Canadian tax, a company which is a resident of Canada shall be allowed to deduct in computing its taxable income any dividend received by it out of the exempt surplus of a foreign affiliate which is a resident of the United States; and"

2. Paragraph 5 of Article XXIV (Elimination of Double Taxation) of the Convention shall be deleted and replaced by the following:

"5. Notwithstanding the provisions of paragraph 4, where a United States citizen is a resident of Canada, the following rules shall apply in respect of the items of income referred to in Article X (Dividends), XI (Interest) or XII (Royalties) that arise (within the meaning of paragraph 3) in the United States and that would be subject to United States tax if the resident of Canada were not a citizen of the United States, as long as the law in force in Canada allows a deduction in computing income for the portion of any foreign tax paid in respect of such items which exceeds 15 per cent of the amount thereof:

(a) The deduction so allowed in Canada shall not be reduced by any credit or deduction for income tax paid or accrued to Canada allowed in computing the United States tax on such items;

(b) Canada shall allow a deduction from Canadian tax on such items in respect of income tax paid or accrued to the United States on such items, except that such deduction need not exceed the amount of the tax that would be paid on such items to the United States if the resident of Canada were not a United States citizen; and

(c) For the purposes of computing the United States tax on such items, the United States shall allow as a credit against United States tax the income tax paid or accrued to Canada after the deduction referred to in subparagraph (b). The credit so allowed shall reduce only that portion of the United States tax on such items which exceeds the amount of tax that would be paid to the United States on such items if the resident of Canada were not a United States citizen."

3. Paragraph 7 of Article XXIV (Elimination of Double Taxation) of the Convention shall be deleted and replaced by the following:

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- "7. For the purposes of this Article, any reference to "income tax paid or accrued" to a Contracting State shall include Canadian tax and United States tax, as the case may be, and taxes of general application which are paid or accrued to a political subdivision or local authority of that State, which are not imposed by that political subdivision or local authority in a manner inconsistent with the provisions of the Convention and which are substantially similar to the Canadian tax or United States tax, as the case may be."
4. A new paragraph 10 shall be added to Article XXIV (Elimination of Double Taxation) of the Convention as follows:
- "10. Where in accordance with any provision of the Convention income derived or capital owned by a resident of a Contracting State is exempt from tax in that State, such State may nevertheless, in calculating the amount of tax on other income or capital, take into account the exempted income or capital."

Article 13

1. Paragraph 3 of Article XXV (Non-Discrimination) of the Convention shall be deleted and replaced by the following:
- "3. In determining the taxable income or tax payable of an individual who is a resident of a Contracting State, there shall be allowed as a deduction in respect of any other person who is a resident of the other Contracting State and who is dependent on the individual for support the amount that would be so allowed if that other person were a resident of the first-mentioned State."
2. Paragraph 10 of Article XXV (Non-Discrimination) of the Convention shall be deleted and replaced by the following:
- "10. Notwithstanding the provisions of Article II (Taxes Covered), this Article shall apply to all taxes imposed by a Contracting State."

Article 14

1. Paragraphs 3(f) and (g) of Article XXVI (Mutual Agreement Procedure) of the Convention shall be deleted and replaced by the following:
- "(f) To the elimination of double taxation with respect to a partnership;
- (g) To provide relief from double taxation resulting from the application of the estate tax imposed by the United States or the Canadian tax as a result of a distribution or disposition of property by a trust that is a qualified domestic trust within the meaning of section 2056A of the Internal Revenue Code, or is described in subsection 70(6) of the Income Tax Act or is treated as such under paragraph 5 of Article XXIX B (Taxes Imposed by Reason of Death), in cases where no relief is otherwise available; or
- (h) To increases in any dollar amounts referred to in the Convention to reflect monetary or economic developments."
2. A new paragraph 6 shall be added to Article XXVI (Mutual Agreement Procedure) of the Convention as follows:
- "6. If any difficulty or doubt arising as to the interpretation or application of the Convention cannot be resolved by the competent authorities pursuant to the preceding paragraphs of this Article, the case may, if both competent author-

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ities and the taxpayer agree, be submitted for arbitration, provided that the taxpayer agrees in writing to be bound by the decision of the arbitration board. The decision of the arbitration board in a particular case shall be binding on both States with respect to that case. The procedures shall be established in an exchange of notes between the Contracting States. The provisions of this paragraph shall have effect after the Contracting States have so agreed through the exchange of notes."

Article 15

A new Article XXVI A (Assistance in Collection) shall be added to the Convention as follows:

"Article XXVI A

Assistance in Collection

1. The Contracting States undertake to lend assistance to each other in the collection of taxes referred to in paragraph 9, together with interest, costs, additions to such taxes and civil penalties, referred to in this Article as a "revenue claim".
2. An application for assistance in the collection of a revenue claim shall include a certification by the competent authority of the applicant State that, under the laws of that State, the revenue claim has been finally determined. For the purposes of this Article, a revenue claim is finally determined when the applicant State has the right under its internal law to collect the revenue claim and all administrative and judicial rights of the taxpayer to restrain collection in the applicant State have lapsed or been exhausted.
3. A revenue claim of the applicant State that has been finally determined may be accepted for collection by the competent authority of the requested State and, subject to the provisions of paragraph 7, if accepted shall be collected by the requested State as though such revenue claim were the requested State's own revenue claim finally determined in accordance with the laws applicable to the collection of the requested State's own taxes.
4. Where an application for collection of a revenue claim in respect of a taxpayer is accepted
 - (a) By the United States, the revenue claim shall be treated by the United States as an assessment under United States laws against the taxpayer as of the time the application is received; and
 - (b) By Canada, the revenue claim shall be treated by Canada as an amount payable under the *Income Tax Act*, the collection of which is not subject to any restriction.
5. Nothing in this Article shall be construed as creating or providing any rights of administrative or judicial review of the applicant State's finally determined revenue claim by the requested State, based on any such rights that may be available under the laws of either Contracting State. If, at any time pending execution of a request for assistance under this Article, the applicant State loses the right under its internal law to collect the revenue claim, the competent authority of the applicant State shall promptly withdraw the request for assistance in collection.

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6. Subject to this paragraph, amounts collected by the requested State pursuant to this Article shall be forwarded to the competent authority of the applicant State. Unless the competent authorities of the Contracting States otherwise agree, the ordinary costs incurred in providing collection assistance shall be borne by the requested State and any extraordinary costs so incurred shall be borne by the applicant State.
7. A revenue claim of an applicant State accepted for collection shall not have in the requested State any priority accorded to the revenue claims of the requested State.
8. No assistance shall be provided under this Article for a revenue claim in respect of a taxpayer to the extent that the taxpayer can demonstrate that
 - (a) Where the taxpayer is an individual, the revenue claim relates to a taxable period in which the taxpayer was a citizen of the requested State, and
 - (b) Where the taxpayer is an entity that is a company, estate or trust, the revenue claim relates to a taxable period in which the taxpayer derived its status as such an entity from the laws in force in the requested State.
9. Notwithstanding the provisions of Article II (Taxes Covered), the provisions of this Article shall apply to all categories of taxes collected by or on behalf of the Government of a Contracting State.
10. Nothing in this Article shall be construed as:
 - (a) Limiting the assistance provided for in paragraph 4 of Article XXVI (Mutual Agreement Procedure); or
 - (b) Imposing on either Contracting State the obligation to carry out administrative measures of a different nature from those used in the collection of its own taxes or that would be contrary to its public policy (ordre public).
11. The competent authorities of the Contracting States shall agree upon the mode of application of this Article, including agreement to ensure comparable levels of assistance to each of the Contracting States."

Article 16

1. Paragraph 1 of Article XXVII (Exchange of Information) of the Convention shall be deleted and replaced by the following:
 - "1. The competent authorities of the Contracting States shall exchange such information as is relevant for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes to which the Convention applies insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Article I (Personal Scope). Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the taxation laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the administration and enforcement in respect of, or the determination of appeals in relation to the taxes to which the Convention applies or, notwithstanding paragraph 4, in relation to taxes imposed by a political subdivision or local authority of a Contracting State that are substantially similar to the taxes covered by the Convention under Article II (Taxes Covered). Such persons or authorities shall use the information only for such purposes. They may disclose

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the information in public court proceedings or in judicial decisions. The competent authorities may release to an arbitration board established pursuant to paragraph 6 of Article XXVI (Mutual Agreement Procedure) such information as is necessary for carrying out the arbitration procedure; the members of the arbitration board shall be subject to the limitations on disclosure described in this Article."

2. Paragraph 4 of Article XXVII (Exchange of Information) of the Convention shall be deleted and replaced by the following:

"4. For the purposes of this Article, the Convention shall apply, notwithstanding the provisions of Article II (Taxes Covered):

- (a) To all taxes imposed by a Contracting State; and
- (b) To other taxes to which any other provision of the Convention applies, but only to the extent that the information is relevant for the purposes of the application of that provision."

Article 17

1. Paragraph 3(a) of the Article XXIX (Miscellaneous Rules) of the Convention shall be deleted and replaced by the following:

"(a) Under paragraphs 3 and 4 of Article IX (Related Persons), paragraphs 6 and 7 of Article XIII (Gains), paragraphs 1, 3, 4, 5, 6(b) and 7 of Article XVIII (Pensions and Annuities), paragraph 5 of Article XXIX (Miscellaneous Rules), paragraphs 1, 5 and 6 of Article XXIX B (Taxes Imposed by Reason of Death), paragraphs 2, 3, 4 and 7 of Article XXIX B (Taxes Imposed by Reason of Death) as applied to the estates of persons other than former citizens referred to in paragraph 2 of this Article, paragraphs 3 and 5 of Article XXX (Entry into Force), and Articles XIX (Government Service), XXI (Exempt Organizations), XXIV (Elimination of Double Taxation), XXV (Non-Discrimination) and XXVI (Mutual Agreement Procedure);"

2. Paragraphs 5 to 7 of Article XXIX (Miscellaneous Rules) of the Convention shall be deleted and replaced by the following:

"5. Where a person who is a resident of Canada and a shareholder of a United States S corporation requests the competent authority of Canada to do so, the competent authority may agree, subject to terms and conditions satisfactory to such competent authority, to apply the following rules for the purposes of taxation in Canada with respect to the period during which the agreement is effective:

- (a) The corporation shall be deemed to be a controlled foreign affiliate of the person;
- (b) All the income of the corporation shall be deemed to be foreign accrual property income;
- (c) For the purposes of subsection 20(11) of the *Income Tax Act*, the amount of the corporation's income that is included in the person's income shall be deemed not to be income from a property; and
- (d) Each dividend paid to the person on a share of the capital stock of the

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corporation shall be excluded from the person's income and shall be deducted in computing the adjusted cost base to the person of the share

6. For purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, the Contracting States agree that:

(a) A measure falls within the scope of the Convention only if:

(i) The measure relates to a tax to which Article XXV (Non-Discrimination) of the Convention applies; or

(ii) The measure relates to a tax to which Article XXV (Non-Discrimination) of the Convention does not apply and to which any other provision of the Convention applies, but only to the extent that the measure relates to a matter dealt with in that other provision of the Convention; and

(b) Notwithstanding paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, any doubt as to the interpretation of subparagraph (a) will be resolved under paragraph 3 of Article XXVI (Mutual Agreement Procedure) of the Convention or any other procedure agreed to by both Contracting States.

7. The appropriate authority of a Contracting State may request consultations with the appropriate authority of the other Contracting State to determine whether change to the Convention is appropriate to respond to changes in the law or policy of that other State. Where domestic legislation enacted by a Contracting State unilaterally removes or significantly limits any material benefit otherwise provided by the Convention, the appropriate authorities shall promptly consult for the purpose of considering an appropriate change to the Convention."

Article 18

A new Article XXIX A (Limitation on Benefits) shall be added to the Convention as follows:

"Article XXIX A

Limitation on Benefits

1. For the purposes of the application of this Convention by the United States.
 - (a) A qualifying person shall be entitled to all of the benefits of this Convention, and
 - (b) Except as provided in paragraphs 3, 4 and 6, a person that is not a qualifying person shall not be entitled to any benefits of the Convention.
2. For the purposes of this Article, a qualifying person is a resident of Canada that is:
 - (a) A natural person;
 - (b) The Government of Canada or a political subdivision or local authority thereof, or any agency or instrumentality of any such government, subdivision or authority;

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- (c) A company or trust in whose principal class of shares or units there is substantial and regular trading on a recognized stock exchange;
- (d) A company more than 50 per cent of the vote and value of the shares (other than debt substitute shares) of which is owned, directly or indirectly, by five or fewer persons each of which is a company or trust referred to in subparagraph (c), provided that each company or trust in the chain of ownership is a qualifying person or a resident or citizen of the United States;
- (e) (i) A company 50 per cent or more of the vote and value of the shares (other than debt substitute shares) of which is not owned, directly or indirectly, by persons other than qualifying persons or residents or citizens of the United States, or
(ii) A trust 50 per cent or more of the beneficial interest in which is not owned, directly or indirectly, by persons other than qualifying persons or residents or citizens of the United States,

where the amount of the expenses deductible from gross income that are paid or payable by the company or trust, as the case may be, for its preceding fiscal period (or, in the case of its first fiscal period, that period) to persons that are not qualifying persons or residents or citizens of the United States is less than 50 per cent of its gross income for that period;

- (f) An estate;
 - (g) A not-for-profit organization, provided that more than half of the beneficiaries, members or participants of the organization are qualifying persons or residents or citizens of the United States; or
 - (h) An organization described in paragraph 2 of Article XXI (Exempt Organizations) and established for the purpose of providing benefits primarily to individuals who are qualifying persons, persons who were qualifying persons within the five preceding years, or residents or citizens of the United States.
3. Where a person that is a resident of Canada and is not a qualifying person of Canada, or a person related thereto, is engaged in the active conduct of a trade or business in Canada (other than the business of making or managing investments, unless those activities are carried on with customers in the ordinary course of business by a bank, an insurance company, a registered securities dealer or a deposit-taking financial institution), the benefits of the Convention shall apply to that resident person with respect to income derived from the United States in connection with or incidental to that trade or business, including any such income derived directly or indirectly by that resident person through one or more other persons that are residents of the United States. Income shall be deemed to be derived from the United States in connection with the active conduct of a trade or business in Canada only if that trade or business is substantial in relation to the activity carried on in the United States giving rise to the income in respect of which benefits provided under the Convention by the United States are claimed.
4. A company that is a resident of Canada shall also be entitled to the benefits of Articles X (Dividends), XI (Interest) and XII (Royalties) if
- (a) Its shares that represent more than 90 per cent of the aggregate vote and value represented by all of its shares (other than debt substitute shares)

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are owned, directly or indirectly, by persons each of whom is a qualifying person, a resident or citizen of the United States or a person who

- (i) Is a resident of a country with which the United States has a comprehensive income tax convention and is entitled to all of the benefits provided by the United States under that convention;
 - (ii) Would qualify for benefits under paragraphs 2 or 3 if that person were a resident of Canada (and, for the purposes of paragraph 3, if the business it carried on in the country of which it is a resident were carried on by it in Canada); and
 - (iii) Would be entitled to a rate of United States tax under the convention between that person's country of residence and the United States, in respect of the particular class of income for which benefits are being claimed under this Convention, that is at least as low as the rate applicable under this Convention; and
- (b) The amount of the expenses deductible from gross income that are paid or payable by the company for its preceding fiscal period (or, in the case of its first fiscal period, that period) to persons that are not qualifying persons or residents or citizens of the United States is less than 50 per cent of the gross income of the company for that period.

5. For the purposes of this Article,

(a) The term "recognized stock exchange" means:

- (i) The NASDAQ System owned by the National Association of Securities Dealers, Inc. and any stock exchange registered with the Securities and Exchange Commission as a national securities exchange for purposes of the Securities Exchange Act of 1934;
- (ii) Canadian stock exchanges that are "prescribed stock exchanges" under the *Income Tax Act*, and
- (iii) Any other stock exchange agreed upon by the Contracting States in an exchange of notes or by the competent authorities of the Contracting States;

(b) The term "not-for-profit organization" of a Contracting State means an entity created or established in that State and that is, by reason of its not-for-profit status, generally exempt from income taxation in that State, and includes a private foundation, charity, trade union, trade association or similar organization; and

(c) The term "debt substitute share" means:

- (i) A share described in paragraph (e) of the definition "term preferred share" in the *Income Tax Act*, as it may be amended from time to time without changing the general principle thereof; and
- (ii) Such other type of share as may be agreed upon by the competent authorities of the Contracting States.

6. Where a person that is a resident of Canada is not entitled under the preceding provisions of this Article to the benefits provided under the Convention by the United States, the competent authority of the United States shall, upon that person's request, determine on the basis of all factors including the history, structure, ownership and operations of that person whether

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- (a) Its creation and existence did not have as a principal purpose the obtaining of benefits under the Convention that would not otherwise be available.
or
- (b) It would not be appropriate, having regard to the purpose of this Article, to deny the benefits of the Convention to that person.

The person shall be granted the benefits of the Convention by the United States where the competent authority determines that subparagraph (a) or (b) applies.

- 7. It is understood that the fact that the preceding provisions of this Article apply only for the purposes of the application of the Convention by the United States shall not be construed as restricting in any manner the right of a Contracting State to deny benefits under the Convention where it can reasonably be concluded that to do otherwise would result in an abuse of the provisions of the Convention."

Article 19

A new Article XXIX B (Taxes Imposed by Reason of Death) shall be added to the Convention as follows:

"Article XXIX B

Taxes Imposed by Reason of Death

- 1. Where the property of an individual who is a resident of a Contracting State passes by reason of the individual's death to an organization referred to in paragraph 1 of Article XXI (Exempt Organizations), the tax consequences in a Contracting State arising out of the passing of the property shall apply as if the organization were a resident of that State.
- 2. In determining the estate tax imposed by the United States, the estate of an individual (other than a citizen of the United States) who was a resident of Canada at the time of the individual's death shall be allowed a unified credit equal to the greater of
 - (a) The amount that bears the same ratio to the credit allowed under the law of the United States to the estate of a citizen of the United States as the value of the part of the individual's gross estate that at the time of the individual's death is situated in the United States bears to the value of the individual's entire gross estate wherever situated; and
 - (b) The unified credit allowed to the estate of a nonresident not a citizen of the United States under the law of the United States.

The amount of any unified credit otherwise allowable under this paragraph shall be reduced by the amount of any credit previously allowed with respect to any gift made by the individual. A credit otherwise allowable under subparagraph (a) shall be allowed only if all information necessary for the verification and computation of the credit is provided.

- 3. In determining the estate tax imposed by the United States on an individual's estate with respect to property that passes to the surviving spouse of the individual (within the meaning of the law of the United States) and that would qualify for the estate tax marital deduction under the law of the United States

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if the surviving spouse were a citizen of the United States and all applicable elections were properly made (in this paragraph and in paragraph 4 referred to as "qualifying property"), a non-refundable credit computed in accordance with the provisions of paragraph 4 shall be allowed in addition to the unified credit allowed to the estate under paragraph 2 or under the law of the United States provided that

- (a) The individual was at the time of death a citizen of the United States or a resident of either Contracting State;
 - (b) The surviving spouse was at the time of the individual's death a resident of either Contracting State;
 - (c) If both the individual and the surviving spouse were residents of the United States at the time of the individual's death, one or both was a citizen of Canada; and
 - (d) The executor of the decedent's estate elects the benefits of this paragraph and waives irrevocably the benefits of any estate tax marital deduction that would be allowed under the law of the United States on a United States Federal estate tax return filed for the individual's estate by the date on which a qualified domestic trust election could be made under the law of the United States.
4. The amount of the credit allowed under paragraph 3 shall equal the lesser of
- (a) The unified credit allowed under paragraph 2 or under the law of the United States (determined without regard to any credit allowed previously with respect to any gift made by the individual), and
 - (b) The amount of estate tax that would otherwise be imposed by the United States on the transfer of qualifying property.

The amount of estate tax that would otherwise be imposed by the United States on the transfer of qualifying property shall equal the amount by which the estate tax (before allowable credits) that would be imposed by the United States if the qualifying property were included in computing the taxable estate exceeds the estate tax (before allowable credits) that would be so imposed if the qualifying property were not so included. Solely for purposes of determining other credits allowed under the law of the United States, the credit provided under paragraph 3 shall be allowed after such other credits.

5. Where an individual was a resident of the United States immediately before the individual's death, for the purposes of subsection 70(6) of the *Income Tax Act*, both the individual and the individual's spouse shall be deemed to have been resident in Canada immediately before the individual's death. Where a trust that would be a trust described in subsection 70(6) of that Act, if its trustees that were residents or citizens of the United States or domestic corporations under the law of the United States were residents of Canada, requests the competent authority of Canada to do so, the competent authority may agree, subject to terms and conditions satisfactory to such competent authority, to treat the trust for the purposes of that Act as being resident in Canada for such time as may be stipulated in the agreement.
6. In determining the amount of tax payable in Canada for a taxation year by an individual who immediately before death was a resident of Canada, or by a trust described in subsection 70(6) of the *Income Tax Act* (or a trust which is treated as being resident in Canada under the provisions of paragraph 5), the amount of any Federal or state estate or inheritance taxes payable in the

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United States (not exceeding, where the individual was a citizen of the United States or a former citizen referred to in paragraph 2 of Article XXIX (Miscellaneous Rules), the amount of estate and inheritance taxes that would have been payable if the individual were not a citizen or former citizen of the United States) in respect of the property situated within the United States shall,

- (a) To the extent that such estate or inheritance taxes are imposed upon the individual's death, be allowed as a deduction from the amount of any Canadian tax otherwise payable by the individual for the taxation year in which the individual died on the total of
 - (i) Any income, profits or gains of the individual arising (within the meaning of paragraph 3 of Article XXIV (Elimination of Double Taxation)) in the United States in that year, and
 - (ii) Where the value at the time of the individual's death of the individual's entire gross estate wherever situated (determined under the law of the United States) exceeded 1.2 million U.S. dollars or its equivalent in Canadian dollars, any income, profits or gains of the individual for that year from property situated in the United States at that time, and
- (b) To the extent that such estate or inheritance taxes are imposed upon the death of the individual's surviving spouse, be allowed as a deduction from the amount of any Canadian tax otherwise payable by the trust for its taxation year in which that spouse dies on any income, profits or gains of the trust for that year arising (within the meaning of paragraph 3 of Article XXIV (Elimination of Double Taxation)) in the United States or from property situated in the United States at the time of death of the spouse.

For purposes of this paragraph, property shall be treated as situated within the United States if it is so treated for estate tax purposes under the law of the United States as in effect on March 17, 1995, subject to any subsequent changes thereof that the competent authorities of the Contracting States have agreed to apply for the purposes of this paragraph. The deduction allowed under this paragraph shall take into account the deduction for any income tax paid or accrued to the United States that is provided under paragraph 2(a), 4(a) or 5(b) of Article XXIV (Elimination of Double Taxation).

- 7. In determining the amount of estate tax imposed by the United States on the estate of an individual who was a resident or citizen of the United States at the time of death, or upon the death of a surviving spouse with respect to a qualified domestic trust created by such an individual or the individual's executor or surviving spouse, a credit shall be allowed against such tax imposed in respect of property situated outside the United States, for the federal and provincial income taxes payable in Canada in respect of such property by reason of the death of the individual or, in the case of a qualified domestic trust, the individual's surviving spouse. Such credit shall be computed in accordance with the following rules:
 - (a) A credit otherwise allowable under this paragraph shall be allowed regardless of whether the identity of the taxpayer under the law of Canada corresponds to that under the law of the United States.
 - (b) The amount of a credit allowed under this paragraph shall be computed in accordance with the provisions and subject to the limitations of the law of the United States regarding credit for foreign death taxes (as it may be

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amended from time to time without changing the general principle hereof), as though the income tax imposed by Canada were a creditable tax under that law.

- (c) A credit may be claimed under this paragraph for an amount of federal or provincial income tax payable in Canada only to the extent that no credit or deduction is claimed for such amount in determining any other tax imposed by the United States, other than the estate tax imposed on property in a qualified domestic trust upon the death of the surviving spouse.
- 8. Provided that the value, at the time of death, of the entire gross estate wherever situated of an individual who was a resident of Canada (other than a citizen of the United States) at the time of death does not exceed 1.2 million U.S. dollars or its equivalent in Canadian dollars, the United States may impose its estate tax upon property forming part of the estate of the individual only if any gain derived by the individual from the alienation of such property would have been subject to income taxation by the United States in accordance with Article XIII (Gains)."

Article 20

1. The appropriate authorities of the Contracting States shall consult within a three-year period from the date on which this Protocol enters into force with respect to further reductions in withholding taxes provided in the Convention, and with respect to the rules in Article XXIX A (Limitation on Benefits) of the Convention.
2. The appropriate authorities of the Contracting States shall consult after a three-year period from the date on which the Protocol enters into force in order to determine whether it is appropriate to make the exchange of notes referred to in Article XXVI (Mutual Agreement Procedure) of the Convention.

Article 21

1. This Protocol shall be subject to ratification in accordance with the applicable procedures in Canada and the United States and instruments of ratification shall be exchanged as soon as possible.
2. The Protocol shall enter into force upon the exchange of instruments of ratification, and shall have effect:
 - (a) For tax withheld at the source on income referred to in Articles X (Dividends), XI (Interest), XII (Royalties) and XVIII (Pensions and Annuities) of the Convention (as it read before the entry into force of this Protocol), with respect to amounts paid or credited on or after the first day of the second month next following the date on which the Protocol enters into force, except that the reference in paragraph 2(a) of Article X (Dividends) of the Convention, as amended by the Protocol, to "5 per cent" shall be read, in its application to amounts paid or credited on or after the first day:
 - (i) Before 1996, as "7 per cent"; and
 - (ii) After 1995 and before 1997, as "6 per cent"; and
 - (b) For other taxes, with respect to taxable years beginning on or after the first day of January next following the date on which the Protocol enters into force, except that the reference in paragraph 6 of Article X (Dividends) of the Con-

TAX AGREEMENTS AND CONVENTIONS

vention, as amended by the Protocol, to "5 per cent" shall be read, in its application to taxable years beginning on or after that first day and ending before 1997, as "6 per cent".

3. Notwithstanding the provisions of paragraph 2, Article XXVI A (Assistance in Collection) of the Convention shall have effect for revenue claims finally determined by a requesting State after the date that is 10 years before the date on which the Protocol enters into force.
4. Notwithstanding the provisions of paragraph 2, paragraphs 2 through 8 of Article XXIX B (Taxes Imposed by Reason of Death) of the Convention (and paragraph 2 of Article II (Taxes Covered) and paragraph 3(a) of Article XXIX (Miscellaneous Rules) of the Convention, as amended by the Protocol, to the extent necessary to implement paragraphs 2 through 8 of Article XXIX B (Taxes Imposed by Reason of Death) of the Convention) shall, notwithstanding any limitation imposed under the law of a Contracting State on the assessment, reassessment or refund with respect to a person's return, have effect with respect to deaths occurring after the date on which the Protocol enters into force and, provided that any claim for refund by reason of this sentence is filed within one year of the date on which the Protocol enters into force or within the otherwise applicable period for filing such claims under domestic law, with respect to benefits provided under any of those paragraphs with respect to deaths occurring after November 10, 1988.
5. Notwithstanding the provisions of paragraph 2, paragraph 2 of Article 3 of the Protocol shall have effect with respect to taxable years beginning on or after the first day of January next following the date on which the Protocol enters into force.

IN WITNESS WHEREOF, the undersigned, duly authorized thereto by their respective Governments, have signed this Protocol.

Done in two copies at Washington this seventeenth day of March 1995, in the English and French languages, each text being equally authentic.

For the Government of Canada:

For the Government of the United States of America:

**FOURTH PROTOCOL AMENDING THE CONVENTION BETWEEN
CANADA AND THE UNITED STATES OF AMERICA WITH
RESPECT TO TAXES ON INCOME AND ON CAPITAL SIGNED AT
WASHINGTON ON SEPTEMBER 26, 1980 AS AMENDED BY THE
PROTOCOLS SIGNED ON JUNE 14, 1983, MARCH 28, 1984 AND
MARCH 17, 1995**

Canada and the United States of America, desiring to conclude a Protocol to amend the Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital signed at Washington on September 26, 1980, as amended by the Protocols signed on June 14, 1983, March 28, 1984 and March 17, 1995 (hereinafter referred to as "the Convention"), have agreed as follows:

Article 1

1. Paragraph 3(a) of Article XIII (Gains) of the Convention shall be deleted and replaced by the following:

“(a) In the case of real property situated in the United States, means a United States real property interest and real property referred to in Article VI (Income from Real Property) situated in the United States, but does not include a share of the capital stock of a company that is not a resident of the United States and

2. Paragraph 3(b)(iii) of Article XIII (Gains) of the Convention shall be deleted and replaced by the following:

“(ii) A share of the capital stock of a company that is a resident of Canada, the value of whose shares is derived principally from real property situated in Canada and”

Article 2

1. Paragraph 3 of Article XVIII (Pensions and Annuities) of the Convention shall be deleted and replaced by the following:

“3. For the purposes of this Convention, the term “pensions” includes any payment under a superannuation, pension or other retirement arrangement: Armed Forces retirement pay, war veterans pensions and allowances and amounts paid under a sickness, accident or disability plan, but does not include payments under an income-averaging annuity contract or, except for the purposes of Article XIX (Government Service), any benefit referred to in paragraph 5.”

2. Paragraph 5 of Article XVIII (Pensions and Annuities) of the Convention shall be deleted and replaced by the following:

“5. Benefits under the social security legislation in a Contracting State (including tier 1 railroad retirement benefits but not including unemployment benefits) paid to a resident of the other Contracting State shall be taxable only in that other State, subject to the following conditions:

(a) a benefit under the social security legislation in the United States

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paid to a resident of Canada shall be taxable in Canada as though it were a benefit under the Canada Pension Plan, except that 15 per cent of the amount of the benefit shall be exempt from Canadian tax; and

- (b) a benefit under the social security legislation in Canada paid to a resident of the United States shall be taxable in the United States as though it were a benefit under the Social Security Act, except that a type of benefit that is not subject to Canadian tax when paid to residents of Canada shall be exempt from United States tax."

Article 3

1. This Protocol shall be subject to ratification in accordance with the applicable procedures in Canada and the United States and instruments of ratification shall be exchanged as soon as possible.
2. This Protocol shall enter into force upon the exchange of instruments of ratification, and shall have effect as follows:
 - (a) Article 1 of this Protocol shall have effect as of April 26, 1995; and
 - (b) Article 2 of this Protocol shall have effect with respect to amounts paid or credited to a resident of the other Contracting State after 1995, except that where a Contracting State has, in accordance with the Convention read without reference to this Protocol, imposed a tax on benefits paid or credited under the social security legislation in that State, and those benefits are paid or credited after 1995 and
 - (i) before the calendar year in which this Protocol enters into force, if this Protocol enters into force before September 1 of that year, or
 - (ii) before the end of the calendar year in which this Protocol enters into force, if this Protocol enters into force after August 31 of that year.

Article 2 shall only have effect with respect to such benefits (referred to in this Article as "source-taxed benefits") as described in paragraphs 3, 4 and 5.

3. With respect to source-taxed benefits paid by a Contracting State to a resident of the other Contracting State, Article 2 applies only if the resident has, within three years after the date on which this Protocol enters into force, applied to the competent authority of the first-mentioned Contracting State for a refund of the tax imposed on the benefits. However, with respect to source-taxed benefits paid by the United States to a resident of Canada, the competent authority of Canada shall:
 - (a) apply for and receive such refund on behalf of the resident;
 - (b) remit to the resident, in accordance with the law of Canada governing refunds of income tax overpayments, such refund less any tax imposed in Canada on the benefits in accordance with Article 2 of this Protocol; and
 - (c) make the application referred to in subparagraph (a) only if the additional tax that would be imposed in Canada on the benefits, on the assumption that Article 2 of this Protocol applied, would be less than the tax imposed in the United States on the benefits as a result of paragraph 5 of Article XVIII (Pensions and Annuities) of the Convention read without reference to this Protocol.
4. All taxes refunded as a result of this Protocol shall be refunded without interest and interest on any taxes of a resident of a Contracting State assessed as a result

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of this Protocol shall be computed as though those taxes became payable no earlier than December 31 of the year following the year in which this Protocol enters into force.

5. The competent authorities of the Contracting States shall establish procedures for making or revoking the application referred to in paragraph 3 and shall agree on such additional procedures as are necessary to ensure the appropriate implementation of this Protocol.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Protocol.

Done at Ottawa in duplicate, in the English and French languages, both texts being equally authentic, this 29th day of July, 1997.

For Canada:

For the United States of America:

Michael Leir

Vladimir Sambaiew

[The next page is 17,229-9]

42-43-44 ELIZABETH II

CHAPTER 34

An Act to amend the Canada-United States
Tax Convention Act, 1984

[Assented to 8th November, 1995]

Her Majesty, by and with the advice and consent of the Senate and House
of Commons of Canada, enacts as follows:

CANADA-UNITED STATES TAX CONVENTION ACT, 1984

1. Section 2 of the *Canada-United States Tax Convention Act, 1984* is
replaced by the following:

Definition of "Convention"

2. In this Act, "Convention" means the Convention between the Government
of Canada and the Government of the United States set out in Schedule I, as
amended by the Protocols set out in Schedules II, III and IV.

2. Section 3 of the Act is amended by adding the following after sub-
section (2):

Inconsistent laws

(2.1) In the event of any inconsistency between the provisions of the *Income
Tax Conventions Interpretation Act* and the provisions of the Convention, and
provisions of that Act prevail to the extent of the inconsistency.

3. The Act is amended by adding, after Schedule III, Schedule IV, as
set out in the schedule to this Act.

GENERAL

4. The Minister of Finance shall cause a notice of the day on which
the Protocol set out in the schedule to this Act comes into force to be
published in the *Canada Gazette* within sixty days after it comes into force.

[The next page is 17,231]

Ottawa, December 8, 1994
94-120

TAXATION OF NON-RESIDENTS' CPP/OPP, OAS BENEFITS DEFERRED

Finance Minister Paul Martin announced today that non-resident individuals who receive Canada Pension Plan (or Quebec Pension Plan) and Old Age Security benefits will become taxable on those benefits as of January 1, 1996 — one year later than originally planned.

Currently, CPP/QPP and OAS payments are taxed only if the recipient resides in Canada. On August 31, 1994, Mr. Martin announced that non-residents would pay non-resident withholding tax on CPP/QPP and OAS amounts received after 1994.

The planned change was timed to coincide with the effective date of the recently-signed Protocol to the Canada-United States tax Convention. In its current form, the Convention allows Canada to tax residents of Canada who receive U.S. social security benefits, but not U.S. residents who receive CPP/QPP and OAS benefits from Canada. The Protocol will instead allow each country to tax any social security payments it makes to residents of the other country.

"It is now clear that the Protocol will not be ratified this year," Mr. Martin explained. "Delaying this tax change will keep our domestic law in line with one of our most important tax treaties."

The Minister also noted that the one-year postponement will allow Human Resources Development Canada more time to both advise recipients of the change, and put in place the necessary systems to withhold the tax.

For further information:

Lawrence Purdy
Tax Legislation Division
(613) 996-0602

Editorial Comment: Mr. Martin's prophesy proved correct. The Third Protocol was revised, and that revised version was signed on March 17, 1995.

[The next page is 17,501]

SCHEDULE D

SECTION 241(4) OF THE INCOME TAX ACT (CANADA)



SCHEDULE D

SECTION 241(4) OF THE INCOME TAX ACT (CANADA)

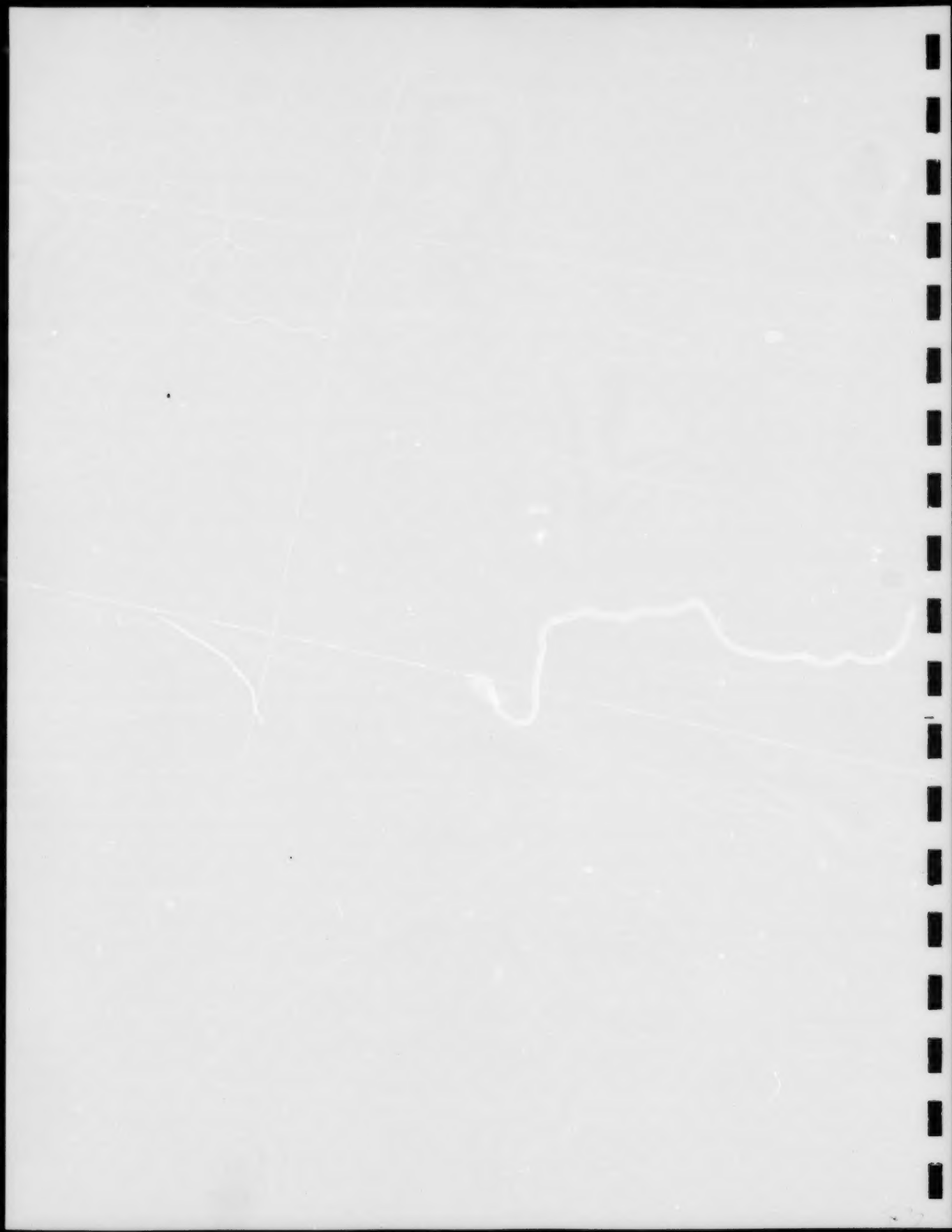
"An official may

- (a) provide to any person taxpayer information that can reasonably be regarded as necessary for the purposes of the administration or enforcement of this Act, the *Canada Pension Plan*, the *Unemployment Insurance Act* or the *Employment Insurance Act*, solely for that purpose;
- (b) provide to any person taxpayer information that can reasonably be regarded as necessary for the purposes of determining any tax, interest, penalty or other amount that is or may become payable by the person, or any refund or tax credit to which the person is or may become entitled, under this Act or any other amount that is relevant for the purposes of that determination;
- (c) provide to the person who seeks a certification referred to in paragraph 147.1(10)(a) the certification or a refusal to make the certification, solely for the purposes of administering a registered pension plan;
- (d) provide taxpayer information
 - (i) to an official of the Department of Finance solely for the purposes of the formulation or evaluation of fiscal policy,
 - (ii) to an official solely for the purposes of the initial implementation of a fiscal policy or for the purposes of the administration or enforcement of an Act of Parliament that provides for the imposition and collection of a tax or duty,
 - (iii) to an official solely for the purposes of the administration or enforcement of a law of a province that provides for the imposition or collection of a tax or duty,
 - (iv) to an official of the government of a province solely for the purposes of the formulation or evaluation of fiscal policy,
 - (v) to an official of the Department of Natural Resources or of the government of a province solely for the purposes of the administration or enforcement of a program of the Government of Canada or of the province relating to the exploration for or exploitation of Canadian petroleum and gas resources,
 - (vi) to an official of the government of a province that has received or is entitled to receive a payment referred to in this subparagraph, or to an official of the Department of Natural Resources, solely for the purposes of the provisions relating to payments to a province in respect of the taxable income of corporations earned in the offshore area with respect to the province under the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, chapter 28 of the Statutes of Canada, 1988, the *Canada-Newfoundland Atlantic Accord Implementation Act*, chapter 3 of the Statutes of Canada, 1987, or similar Acts relating to the exploration for or exploitation of offshore Canadian petroleum and gas resources,
 - (vi.1) to an official of the Department of Natural Resources solely for the purpose of determining whether property is prescribed energy conservation property or whether an outlay or expense is a Canadian renewable and conservation expense.

- (vii) to an official solely for the purposes of the administration or enforcement of the *Pension Benefits Standards Act*, 1985 or a similar law of a province.
- (vii.1) to an official of the Department of Human Resources Development or to a prescribed official solely for the purpose of the administration or enforcement of Part III.1 of the *Department of Human Resources Development Act*.
- (viii) to an official of the Department of Veterans Affairs solely for the purposes of the administration of the *War Veterans Allowance Act* or Part XI of the *Merchant Navy Veteran and Civilian War-related Benefits Act*.
- (ix) to an official of a department or agency of the Government of Canada or of a province as to the name, address, occupation, size or type of business of a taxpayer, solely for the purposes of enabling that department or agency to obtain statistical data for research and analysis.
- (x) to an official of the Canada Employment Insurance Commission or the Department of Employment and Immigration solely for the purpose of the administration or enforcement of, or the evaluation or formation of policy for the purposes of, the *Unemployment Insurance Act*, the *Employment Insurance Act* or an employment program of the Government of Canada.
- (xi) to an official of the Department of Agriculture and Agri-Food or of the government of a province solely for the purposes of the administration or enforcement of a program of the Government of Canada or of the province established under an agreement entered into under the *Farm Income Protection Act*.
- (xii) to an official of the Department of Canadian Heritage or a member of the Canadian Cultural Property Export Review Board solely for the purposes of administering sections 32 to 33.2 of the *Cultural Property Export and Import Act*.
- (xiii) to an official solely for the purposes of setting off against any sum of money that may be due or payable by Her Majesty in right of Canada a debt due to
 - (A) Her Majesty in right of Canada, or
 - (B) Her Majesty in right of a province, or
- (xiv) to an official solely for the purposes of section 7.1 of the *Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act*;
- (e) provide taxpayer information, or allow the inspection of or access to taxpayer information, as the case may be, under, and solely for the purposes of,
 - (i) subsection 36(2) or section 46 of the *Access to Information Act*,
 - (ii) section 13 of the *Auditor General Act*,
 - (iii) section 92 of the *Canada Pension Plan*,
 - (iv) a warrant issued under subsection 21(3) of the *Canadian Security Intelligence Service Act*,
 - (v) an order made under subsection 462.48(3) of the *Criminal Code*
 - (vi) section 26 of the *Cultural Property Export and Import Act*,
 - (vii) section 79 of the *Family Orders and Agreements Enforcement Assistance Act*,
 - (viii) paragraph 33.11(a) of the *Old Age Security Act*,
 - (ix) subsection 34(2) or section 45 of the *Privacy Act*,

- (x) section 24 of the *Statistics Act*;
- (xi) section 9 of the *Tax Rebate Discounting Act*, or
- (xii) a provision contained in a tax convention or agreement between Canada and another country that has the force of law in Canada;
- (f) provide taxpayer information solely for the purposes of sections 23 to 25 of the *Financial Administration Act*;
- (g) use taxpayer information to compile information in a form that does not directly or indirectly reveal the identity of the taxpayer to whom the information relates;
- (h) use, or provide to any person, taxpayer information solely for a purpose relating to the supervision, evaluation or discipline of an authorized person by Her Majesty in right of Canada in respect of a period during which the authorized person was employed by or engaged by or on behalf of Her Majesty in right of Canada to assist in the administration or enforcement of this Act, the *Canada Pension Plan*, the *Unemployment Insurance Act* or the *Employment Insurance Act*, to the extent that the information is relevant for the purpose;
- (i) provide access to records of taxpayer information to the National Archivist of Canada or a person acting on behalf of or under the direction of the National Archivist of Canada, solely for the purposes of section 5 of the *National Archives of Canada Act*, and transfer such records to the care and control of such persons solely for the purposes of section 6 of that Act;
- (j) use taxpayer information relating to a taxpayer to provide information to the taxpayer;
- (j.1) provide taxpayer information to an official or a designated person solely for the purpose of permitting the making of an adjustment to
 - (i) a social assistance payment made on the basis of a means, needs or income test, or
 - (ii) a payment pursuant to a prescribed law of a province in respect of a child within the meaning of the prescribed law, where the purpose of the adjustment is to take into account the amount determined for C in subsection 122.61(1) in respect of a person for a taxation year;
- (k) provide, or allow inspection of or access to, taxpayer information to or by any person otherwise legally entitled to it under an Act of Parliament solely for the purposes for which that person is entitled to it under an Act of Parliament solely for the purposes for which that person is entitled to the information;
- (l) provide the business number, name, address, telephone number and facsimile number of a holder of a business number to an official of a department or agency of the Government of Canada or of a province solely for the purpose of the administration or enforcement of an Act of Parliament or a law of a province, if the holder of the business number is required by that Act or that law to provide the information (other than the business number) to the department or agency, or
- (m) provide taxpayer information to an official of the government of a province solely for use in the management or administration by that government of a program relating to payments under subsection 154(1.8).

SCHEDULE E
SECTION 6103 OF THE INTERNAL REVENUE CODE (USA)



Sec. 6103. Confidentiality and disclosure of returns and return information

- (a) General rule

Returns and return information shall be confidential, and except as authorized by this title -

- (1) no officer or employee of the United States,
- (2) no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section, and
- (3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), paragraph (6) or (12) of subsection (l), paragraph (2) or (4)(B) of subsection (m), or subsection (n), shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

- (b) Definitions

For purposes of this section -

- (1) Return

The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

- (2) Return information

The term "return information" means -

- (A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and
 - (B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110, but such term does not include data in a form which cannot be

associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

- (3) Taxpayer return information

The term "taxpayer return information" means return information as defined in paragraph (2) which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates.

- (4) Tax administration

The term "tax administration" -

- (A) means -
 - (i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and
 - (ii) the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions, and
- (B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions.

- (5) State

The term "State" means -

- (A) any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Canal Zone, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and
- (B) for purposes of subsections (a)(2), (b)(4), (d)(1),
 - (i) for purposes of subsections (a)(2), (b)(4), (d)(1),
 - (i) with a population in excess of 250,000 (as determined under the most recent decennial United States census data available),
 - (ii) which imposes a tax on income or wages, and
 - (iii) with which the Secretary (in his sole discretion) has entered into an agreement regarding disclosure.

- (6) Taxpayer identity

The term "taxpayer identity" means the name of a person with respect to whom a return is filed, his mailing address, his taxpayer identifying number (as described in section 6109), or a combination thereof.

- (7) Inspection

The terms "inspected" and "inspection" mean any examination

- of a return or return information.
- (8) Disclosure
The term "disclosure" means the making known to any person in any manner whatever a return or return information.
- (9) Federal agency
The term "Federal agency" means an agency within the meaning of section 551(1) of title 5, United States Code.
- (10) Chief executive officer
The term "chief executive officer" means, with respect to any municipality, any elected official and the chief official (even if not elected) of such municipality.
- (c) Disclosure of returns and return information to designee of taxpayer
The Secretary may, subject to such requirements and conditions as he may prescribe by regulations, disclose the return of any taxpayer, or return information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a request for or consent to such disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. However, return information shall not be disclosed to such person or persons if the Secretary determines that such disclosure would seriously impair Federal tax administration.
- (d) Disclosure to State tax officials and State and local law enforcement agencies
 - (1) In general
Returns and return information with respect to taxes imposed by chapters 1, 2, 6, 11, 12, 21, 23, 24, 31, 32, 44, 51, and 52 and subchapter D of chapter 36 shall be open to inspection by, or disclosure to, any State agency, body, or commission, or its legal representative, which is charged under the laws of such State with responsibility for the administration of State tax laws for the purpose of, and only to the extent necessary in, the administration of such laws, including any procedures with respect to locating any person who may be entitled to a refund. Such inspection shall be permitted, or such disclosure made, only upon written request by the head of such agency, body, or commission, and only to the representatives of such agency, body, or commission designated in such written request as the individuals who are to inspect or to receive the returns or return information on behalf of such agency, body, or commission. Such representatives shall not include any individual who is the chief executive officer of such State or who is neither an employee or legal representative of such agency, body, or commission nor a person described in subsection (n). However, such return information shall not be disclosed to the extent that the Secretary determines that such disclosure would identify a confidential informant or seriously impair any civil or criminal tax investigation.
 - (2) Disclosure to State audit agencies

- (A) In general
Any returns or return information obtained under paragraph (1) by any State agency, body, or commission may be open to inspection by, or disclosure to, officers and employees of the State audit agency for the purpose of, and only to the extent necessary in, making an audit of the State agency, body, or commission referred to in paragraph (1).
- (B) State audit agency
For purposes of subparagraph (A), the term "State audit agency" means any State agency, body, or commission which is charged under the laws of the State with the responsibility of auditing State revenues and programs.
- (3) Exception for reimbursement under section 7624
Nothing in this section shall be construed to prevent the Secretary from disclosing to any State or local law enforcement agency which may receive a payment under section 7624 the amount of the recovered taxes with respect to which such a payment may be made.
- (4) Availability and use of death information
 - (A) In general
No returns or return information may be disclosed under paragraph (1) to any agency, body, or commission of any State (or any legal representative thereof) during any period during which a contract meeting the requirements of subparagraph (B) is not in effect between such State and the Secretary of Health and Human Services.
 - (B) Contractual requirements
A contract meets the requirements of this subparagraph if -
 - (i) such contract requires the State to furnish the Secretary of Health and Human Services information concerning individuals with respect to whom death certificates (or equivalent documents maintained by the State or any subdivision thereof) have been officially filed with it, and
 - (ii) such contract does not include any restriction on the use of information obtained by such Secretary pursuant to such contract, except that such contract may provide that such information is only to be used by the Secretary (or any other Federal agency) for purposes of ensuring that Federal benefits or other payments are not erroneously paid to deceased individuals.

Any information obtained by the Secretary of Health and Human Services under such a contract shall be exempt from disclosure under section 552 of title 5, United States Code, and from the requirements of section 552a of such title 5.
 - (C) Special exception
The provisions of subparagraph (A) shall not apply to any State which on July 1, 1993, was not, pursuant to a contract, furnishing the Secretary of Health and Human Services

information concerning individuals with respect to whom death certificates (or equivalent documents maintained by the State or any subdivision thereof) have been officially filed with it.

- (e) Disclosure to persons having material interest

- (1) In general

The return of a person shall, upon written request, be open to inspection by or disclosure to -

- (A) in the case of the return of an individual -

- (i) that individual,
 - (ii) if property transferred by that individual to a trust is sold or exchanged in a transaction described in section 644, the trustee or trustees, jointly or separately, of such trust to the extent necessary to ascertain any amount of tax imposed upon the trust by section 644,
 - (iii) the spouse of that individual if the individual and such spouse have signified their consent to consider a gift reported on such return as made one-half by him and one-half by the spouse pursuant to the provisions of section 2513; or
 - (iv) the child of that individual (or such child's legal representative) to the extent necessary to comply with the provisions of section 1(g) or 59(j);

- (B) in the case of an income tax return filed jointly, either of the individuals with respect to whom the return is filed;

- (C) in the case of the return of a partnership, any person who was a member of such partnership during any part of the period covered by the return;

- (D) in the case of the return of a corporation or a subsidiary thereof -

- (i) any person designated by resolution of its board of directors or other similar governing body,
 - (ii) any officer or employee of such corporation upon written request signed by any principal officer and attested to by the secretary or other officer,
 - (iii) any bona fide shareholder of record owning 1 percent or more of the outstanding stock of such corporation,
 - (iv) if the corporation was a foreign personal holding company, as defined by section 552, any person who was a shareholder during any part of a period covered by such return if with respect to that period, or any part thereof, such shareholder was required under section 551 to include in his gross income undistributed foreign personal holding company income of such company,
 - (v) if the corporation was an electing small business corporation under subchapter S of chapter 1, any person who was a shareholder during any part of the period covered by such return during which an election was in effect, or
 - (vi) if the corporation has been dissolved, any person authorized by applicable State law to act for the corporation

or any person who the Secretary finds to have a material interest which will be affected by information contained therein;

- (E) in the case of the return of an estate -
 - (i) the administrator, executor, or trustee of such estate, and
 - (ii) any heir at law, next of kin, or beneficiary under the will, of the decedent, but only if the Secretary finds that such heir at law, next of kin, or beneficiary has a material interest which will be affected by information contained therein; and
- (F) in the case of the return of a trust -
 - (i) the trustee or trustees, jointly or separately, and
 - (ii) any beneficiary of such trust, but only if the Secretary finds that such beneficiary has a material interest which will be affected by information contained therein.
- (2) Incompetency
If an individual described in paragraph (1) is legally incompetent, the applicable return shall, upon written request, be open to inspection by or disclosure to the committee, trustee, or guardian of his estate.
- (3) Deceased individuals
The return of a decedent shall, upon written request, be open to inspection by or disclosure to -
 - (A) the administrator, executor, or trustee of his estate, and
 - (B) any heir at law, next of kin, or beneficiary under the will, of such decedent, or a donee of property, but only if the Secretary finds that such heir at law, next of kin, beneficiary, or donee has a material interest which will be affected by information contained therein.
- (4) Title 11 cases and receivership proceedings
If -
 - (A) there is a trustee in a title 11 case in which the debtor is the person with respect to whom the return is filed, or
 - (B) substantially all of the property of the person with respect to whom the return is filed is in the hands of a receiver,
such return or returns for prior years of such person shall, upon written request, be open to inspection by or disclosure to such trustee or receiver, but only if the Secretary finds that such trustee or receiver, in his fiduciary capacity, has a material interest which will be affected by information contained therein.
- (5) Individual's title 11 case
 - (A) In general
In any case to which section 1398 applies (determined without regard to section 1398(b)(1)), any return of the debtor for the taxable year in which the case commenced or any preceding

taxable year shall, upon written request, be open to inspection by or disclosure to the trustee in such case.

- (B) Return of estate available to debtor
Any return of an estate in a case to which section 1398 applies shall, upon written request, be open to inspection by or disclosure to the debtor in such case.
- (C) Special rule for involuntary cases
In an involuntary case, no disclosure shall be made under subparagraph (A) until the order for relief has been entered by the court having jurisdiction of such case unless such court finds that such disclosure is appropriate for purposes of determining whether an order for relief should be entered.

- (6) Attorney in fact
Any return to which this subsection applies shall, upon written request, also be open to inspection by or disclosure to the attorney in fact duly authorized in writing by any of the persons described in paragraph (1), (2), (3), (4), or (5) to inspect the return or receive the information on his behalf, subject to the conditions provided in such paragraphs.
- (7) Return information
Return information with respect to any taxpayer may be open to inspection by or disclosure to any person authorized by this subsection to inspect any return of such taxpayer if the Secretary determines that such disclosure would not seriously impair Federal tax administration.
- (8) Disclosure of collection activities with respect to joint return
If any deficiency of tax with respect to a joint return is assessed and the individuals filing such return are no longer married or no longer reside in the same household, upon request in writing by either of such individuals, the Secretary shall disclose in writing to the individual making the request whether the Secretary has attempted to collect such deficiency from such other individual, the general nature of such collection activities, and the amount collected. The preceding sentence shall not apply to any deficiency which may not be collected by reason of section 6502.
- (9) Disclosure of certain information where more than 1 person subject to penalty under section 6672
If the Secretary determines that a person is liable for a penalty under section 6672(a) with respect to any failure, upon request in writing of such person, the Secretary shall disclose in writing to such person -
 - (A) the name of any other person whom the Secretary has determined to be liable for such penalty with respect to such failure, and
 - (B) whether the Secretary has attempted to collect such penalty from such other person, the general nature of such

collection activities, and the amount collected.

- (f) Disclosure to Committees of Congress
 - (1) Committee on Ways and Means, Committee on Finance, and Joint Committee on Taxation

Upon written request from the chairman of the Committee on Ways and Means of the House of Representatives, the chairman of the Committee on Finance of the Senate, or the chairman of the Joint Committee on Taxation, the Secretary shall furnish such committee with any return or return information specified in such request, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.
 - (2) Chief of Staff of Joint Committee on Taxation

Upon written request by the Chief of Staff of the Joint Committee on Taxation, the Secretary shall furnish him with any return or return information specified in such request. Such Chief of Staff may submit such return or return information to any committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.
 - (3) Other committees

Pursuant to an action by, and upon written request by the chairman of, a committee of the Senate or the House of Representatives (other than a committee specified in paragraph (1)) specially authorized to inspect any return or return information by a resolution of the Senate or the House of Representatives or, in the case of a joint committee (other than the joint committee specified in paragraph (1)) by concurrent resolution, the Secretary shall furnish such committee, or a duly authorized and designated subcommittee thereof, sitting in closed executive session, with any return or return information which such resolution authorizes the committee or subcommittee to inspect. Any resolution described in this paragraph shall specify the purpose for which the return or return information is to be furnished and that such information cannot reasonably be obtained from any other source.
 - (4) Agents of committees and submission of information to Senate or House of Representatives
 - (A) Committees described in paragraph (1)

Any committee described in paragraph (1) or the Chief of Staff of the Joint Committee on Taxation shall have the authority, acting directly, or by or through such examiners or agents as the chairman of such committee or such chief of staff

may designate or appoint, to inspect returns and return information at such time and in such manner as may be determined by such chairman or chief of staff. Any return or return information obtained by or on behalf of such committee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or to both. The Joint Committee on Taxation may also submit such return or return information to any other committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

- (B) Other committees
Any committee or subcommittee described in paragraph (3) shall have the right, acting directly, or by or through no more than four examiners or agents, designated or appointed in writing in equal numbers by the chairman and ranking minority member of such committee or subcommittee, to inspect returns and return information at such time and in such manner as may be determined by such chairman and ranking minority member. Any return or return information obtained by or on behalf of such committee or subcommittee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or to both, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer, shall be furnished to the Senate or the House of Representatives only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.
- (g) Disclosure to President and certain other persons
 - (1) In general
Upon written request by the President, signed by him personally, the Secretary shall furnish to the President, or to such employee or employees of the White House Office as the President may designate by name in such request, a return or return information with respect to any taxpayer named in such request. Any such request shall state -
 - (A) the name and address of the taxpayer whose return or return information is to be disclosed,
 - (B) the kind of return or return information which is to be disclosed,
 - (C) the taxable period or periods covered by such return or return information, and
 - (D) the specific reason why the inspection or disclosure is requested.

- (2) Disclosure of return information as to Presidential appointees and certain other Federal Government appointees
The Secretary may disclose to a duly authorized representative of the Executive Office of the President or to the head of any Federal agency, upon written request by the President or head of such agency, or to the Federal Bureau of Investigation on behalf of and upon written request by the President or such head, return information with respect to an individual who is designated as being under consideration for appointment to a position in the executive or judicial branch of the Federal Government. Such return information shall be limited to whether such individual -
 - (A) has filed returns with respect to the taxes imposed under chapter 1 for not more than the immediately preceding 3 years;
 - (B) has failed to pay any tax within 10 days after notice and demand, or has been assessed any penalty under this title for negligence, in the current year or immediately preceding 3 years;
 - (C) has been or is under investigation for possible criminal offenses under the internal revenue laws and the results of any such investigation; or
 - (D) has been assessed any civil penalty under this title for fraud.Within 3 days of the receipt of any request for any return information with respect to any individual under this paragraph, the Secretary shall notify such individual in writing that such information has been requested under the provisions of this paragraph.
- (3) Restriction on disclosure
The employees to whom returns and return information are disclosed under this subsection shall not disclose such returns and return information to any other person except the President or the head of such agency without the personal written direction of the President or the head of such agency.
- (4) Restriction on disclosure to certain employees
Disclosure of returns and return information under this subsection shall not be made to any employee whose annual rate of basic pay is less than the annual rate of basic pay specified for positions subject to section 5316 of title 5, United States Code.
- (5) Reporting requirements
Within 30 days after the close of each calendar quarter, the President and the head of any agency requesting returns and return information under this subsection shall each file a report with the Joint Committee on Taxation setting forth the taxpayers with respect to whom such requests were made during such quarter under this subsection, the returns or return information involved, and the reasons for such requests. The President shall not be required to report on any request for returns and return information pertaining to an individual who was an officer or

employee of the executive branch of the Federal Government at the time such request was made. Reports filed pursuant to this paragraph shall not be disclosed unless the Joint Committee on Taxation determines that disclosure thereof (including identifying details) would be in the national interest. Such reports shall be maintained by the Joint Committee on Taxation for a period not exceeding 2 years unless, within such period, the Joint Committee on Taxation determines that a disclosure to the Congress is necessary.

- (h) Disclosure to certain Federal officers and employees for purposes of tax administration, etc.
 - (1) Department of the Treasury
Returns and return information shall, without written request, be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for tax administration purposes.
 - (2) Department of Justice
In a matter involving tax administration, a return or return information shall be open to inspection by or disclosure to officers and employees of the Department of Justice (including United States attorneys) personally and directly engaged in, and solely for their use in, any proceeding before a Federal grand jury or preparation for any proceeding (or investigation which may result in such a proceeding) before a Federal grand jury or any Federal or State court, but only if -
 - (A) the taxpayer is or may be a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability in respect of any tax imposed under this title;
 - (B) the treatment of an item reflected on such return is or may be related to the resolution of an issue in the proceeding or investigation; or
 - (C) such return or return information relates or may relate to a transactional relationship between a person who is or may be a party to the proceeding and the taxpayer which affects, or may affect, the resolution of an issue in such proceeding or investigation.
 - (3) Form of request
In any case in which the Secretary is authorized to disclose a return or return information to the Department of Justice pursuant to the provisions of this subsection -
 - (A) if the Secretary has referred the case to the Department of Justice, or if the proceeding is authorized by subchapter B of chapter 76, the Secretary may make such disclosure on his own motion, or
 - (B) if the Secretary receives a written request from the Attorney General, the Deputy Attorney General, or an Assistant

Attorney General for a return of, or return information relating to, a person named in such request and setting forth the need for the disclosure, the Secretary shall disclose return or return information so requested.

- (4) Disclosure in judicial and administrative tax proceedings
A return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration, but only -
 - (A) the taxpayer is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability, in respect of any tax imposed under this title;
 - (B) if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding;
 - (C) if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding; or
 - (D) to the extent required by order of a court pursuant to section 3500 of title 18, United States Code, or rule 16 of the Federal Rules of Criminal Procedure, such court being authorized in the issuance of such order to give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in this title.However, such return or return information shall not be disclosed as provided in subparagraph (A), (B), or (C) if the Secretary determines that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation.
- (5) Prospective jurors
In connection with any judicial proceeding described in paragraph (4) to which the United States is a party, the Secretary shall respond to a written inquiry from an attorney of the Department of Justice (including a United States attorney) involved in such proceeding or any person (or his legal representative) who is a party to such proceeding as to whether an individual who is a prospective juror in such proceeding has or has not been the subject of any audit or other tax investigation by the Internal Revenue Service. The Secretary shall limit such response to an affirmative or negative reply to such inquiry.
- (6) Withholding of tax from social security benefits
Upon written request of the payor agency, the Secretary may disclose available return information from the master files of the Internal Revenue Service with respect to the address and

status of an individual as a nonresident alien or as a citizen or resident of the United States to the Social Security Administration or the Railroad Retirement Board (whichever is appropriate) for purposes of carrying out its responsibilities for withholding tax under section 1441 from social security benefits (as defined in section 86(d)).

- (i) Disclosure to Federal officers or employees for administration of Federal laws not relating to tax administration
 - (1) Disclosure of returns and return information for use in criminal investigations
 - (A) In general
Except as provided in paragraph (6), any return or return information with respect to any specified taxable period or periods shall, pursuant to and upon the grant of an ex parte order by a Federal district court judge or magistrate under subparagraph (B), be open (but only to the extent necessary as provided in such order) to inspection by, or disclosure to, officers and employees of any Federal agency who are personally and directly engaged in -
- (i) preparation for any judicial or administrative proceeding pertaining to the enforcement of a specifically designated Federal criminal statute (not involving tax administration) to which the United States or such agency is or may be a party,
- (ii) any investigation which may result in such a proceeding, or
- (iii) any Federal grand jury proceeding pertaining to enforcement of such a criminal statute to which the United States or such agency is or may be a party, solely for the use of such officers and employees in such preparation, investigation, or grand jury proceeding.
 - (B) Application for order
The Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, any United States attorney, any special prosecutor appointed under section 593 of title 28, United States Code, or any attorney in charge of a criminal division organized crime strike force established pursuant to section 510 of title 28, United States Code, may authorize an application to a Federal district court judge or magistrate for the order referred to in subparagraph (A). Upon such application, such judge or magistrate may grant such order if he determines on the basis of the facts submitted by the applicant that -
- (i) there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed,
- (ii) there is reasonable cause to believe that the return or return information is or may be relevant to a matter

- relating to the commission of such act, and
- (iii) the return or return information is sought exclusively for use in a Federal criminal investigation or proceeding concerning such act, and the information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.
 - (2) Disclosure of return information other than taxpayer return information for use in criminal investigations
 - (A) In general

Except as provided in paragraph (6), upon receipt by the Secretary of a request which meets the requirements of subparagraph (B) from the head of any Federal agency or the Inspector General thereof, or, in the case of the Department of Justice, the Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, any United States attorney, any special prosecutor appointed under section 593 of title 28, United States Code, or any attorney in charge of a criminal division organized crime strike force established pursuant to section 510 of title 28, United States Code, the Secretary shall disclose return information (other than taxpayer return information) to officers and employees of such agency who are personally and directly engaged in -
 - (i) preparation for any judicial or administrative proceeding described in paragraph (1)(A)(i),
 - (ii) any investigation which may result in such a proceeding, or
 - (iii) any grand jury proceeding described in paragraph (1)(A)(iii),

solely for the use of such officers and employees in such preparation, investigation, or grand jury proceeding.
 - (B) Requirements

A request meets the requirements of this subparagraph if the request is in writing and sets forth -
 - (i) the name and address of the taxpayer with respect to whom the requested return information relates;
 - (ii) the taxable period or periods to which such return information relates;
 - (iii) the statutory authority under which the proceeding or investigation described in subparagraph (A) is being conducted; and
 - (iv) the specific reason or reasons why such disclosure is, or may be, relevant to such proceeding or investigation.
 - (C) Taxpayer identity

For purposes of this paragraph, a taxpayer's identity shall not be treated as taxpayer return information.
 - (3) Disclosure of return information to apprise appropriate

officials of criminal activities or emergency circumstances

- (A) Possible violations of Federal criminal law
 - (i) In general

Except as provided in paragraph (6), the Secretary may disclose in writing return information (other than taxpayer return information) which may constitute evidence of a violation of any Federal criminal law (not involving tax administration) to the extent necessary to apprise the head of the appropriate Federal agency charged with the responsibility of enforcing such law. The head of such agency may disclose such return information to officers and employees of such agency to the extent necessary to enforce such law.
 - (ii) Taxpayer identity

If there is return information (other than taxpayer return information) which may constitute evidence of a violation by any taxpayer of any Federal criminal law (not involving tax administration), such taxpayer's identity may also be disclosed under clause (i).

 - (B) Emergency circumstances
- (i) Danger of death or physical injury

Under circumstances involving an imminent danger of death or physical injury to any individual, the Secretary may disclose return information to the extent necessary to apprise appropriate officers or employees of any Federal or State law enforcement agency of such circumstances.
- (ii) Flight from Federal prosecution

Under circumstances involving the imminent flight of any individual from Federal prosecution, the Secretary may disclose return information to the extent necessary to apprise appropriate officers or employees of any Federal law enforcement agency of such circumstances.

 - (4) Use of certain disclosed returns and return information in judicial or administrative proceedings
 - (A) Returns and taxpayer return information

Except as provided in subparagraph (C), any return or taxpayer return information obtained under paragraph (1) may be disclosed in any judicial or administrative proceeding pertaining to enforcement of a specifically designated Federal criminal statute or related civil forfeiture (not involving tax administration) to which the United States or a Federal agency is a party -
 - (i) if the court finds that such return or taxpayer return information is probative of a matter in issue relevant in establishing the commission of a crime or the guilt or liability of a party, or
 - (ii) to the extent required by order of the court pursuant to section 3500 of title 18, United States Code, or rule 16

of the Federal Rules of Criminal Procedure.

- (B) Return information (other than taxpayer return information) Except as provided in subparagraph (C), any return information (other than taxpayer return information) obtained under paragraph (1), (2), or (3)(A) may be disclosed in any judicial or administrative proceeding pertaining to enforcement of a specifically designated Federal criminal statute or related civil forfeiture (not involving tax administration) to which the United States or a Federal agency is a party.
- (C) Confidential informant; impairment of investigations No return or return information shall be admitted into evidence under subparagraph (A)(i) or (B) if the Secretary determines and notifies the Attorney General or his delegate or the head of the Federal agency that such admission would identify a confidential informant or seriously impair a civil or criminal tax investigation.
- (D) Consideration of confidentiality policy In ruling upon the admissibility of returns or return information, and in the issuance of an order under subparagraph (A)(ii), the court shall give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in this title.
- (E) Reversible error The admission into evidence of any return or return information contrary to the provisions of this paragraph shall not, as such, constitute reversible error upon appeal of a judgment in the proceeding.
 - (5) Disclosure to locate fugitives from justice
- (A) In general Except as provided in paragraph (6), the return of an individual or return information with respect to such individual shall, pursuant to and upon the grant of an ex parte order by a Federal district court judge or magistrate under subparagraph (B), be open (but only to the extent necessary as provided in such order) to inspection by, or disclosure to, officers and employees of any Federal agency exclusively for use in locating such individual.
- (B) Application for order Any person described in paragraph (1)(B) may authorize an application to a Federal district court judge or magistrate for an order referred to in subparagraph (A). Upon such application, such judge or magistrate may grant such order if he determines on the basis of the facts submitted by the applicant that -
 - (i) a Federal arrest warrant relating to the commission of a Federal felony offense has been issued for an individual who is a fugitive from justice,
 - (ii) the return of such individual or return information

with respect to such individual is sought exclusively for use in locating such individual, and

- (iii) there is reasonable cause to believe that such return or return information may be relevant in determining the location of such individual.
 - (6) Confidential informants; impairment of investigations
The Secretary shall not disclose any return or return information under paragraph (1), (2), (3)(A), (5), or (7) if the Secretary determines (and, in the case of a request for disclosure pursuant to a court order described in paragraph (1)(B) or (5)(B), certifies to the court) that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation.
 - (7) Comptroller General
 - (A) Returns available for inspection
Except as provided in subparagraph (C), upon written request by the Comptroller General of the United States, returns and return information shall be open to inspection by, or disclosure to, officers and employees of the General Accounting Office for the purpose of, and to the extent necessary in, making -
- (i) an audit of the Internal Revenue Service or the Bureau of Alcohol, Tobacco and Firearms which may be required by section 713 of title 31, United States Code, or
- (ii) any audit authorized by subsection (p)(6), except that no such officer or employee shall, except to the extent authorized by subsection (f) or (p)(6), disclose to any person, other than another officer or employee of such office whose official duties require such disclosure, any return or return information described in section 4424(a) in a form which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer, nor shall such officer or employee disclose any other return or return information, except as otherwise expressly provided by law, to any person other than such other officer or employee of such office in a form which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.
 - (B) Audits of other agencies
- (i) In general
Nothing in this section shall prohibit any return or return information obtained under this title by any Federal agency (other than an agency referred to in subparagraph (A)) for use in any program or activity from being open to inspection by, or disclosure to, officers and employees of the General Accounting Office if such inspection or disclosure is -
 - (I) for purposes of, and to the extent necessary in, making an audit authorized by law of such program or activity, and

- (II) pursuant to a written request by the Comptroller General of the United States to the head of such Federal agency.
- (ii) Information from Secretary
If the Comptroller General of the United States determines that the returns or return information available under clause
- (i) are not sufficient for purposes of making an audit of any program or activity of a Federal agency (other than an agency referred to in subparagraph (A)), upon written request by the Comptroller General to the Secretary, returns and return information (of the type authorized by subsection (l) or (m) to be made available to the Federal agency for use in such program or activity) shall be open to inspection by, or disclosure to, officers and employees of the General Accounting Office for the purpose of, and to the extent necessary in, making such audit.
- (iii) Requirement of notification upon completion of audit
Within 90 days after the completion of an audit with respect to which returns or return information were opened to inspection or disclosed under clause (i) or (ii), the Comptroller General of the United States shall notify in writing the Joint Committee on Taxation of such completion. Such notice shall include -
 - (I) a description of the use of the returns and return information by the Federal agency involved,
 - (II) such recommendations with respect to the use of returns and return information by such Federal agency as the Comptroller General deems appropriate, and
 - (III) a statement on the impact of any such recommendations on confidentiality of returns and return information and the administration of this title.
- (iv) Certain restrictions made applicable
The restrictions contained in subparagraph (A) on the disclosure of any returns or return information open to inspection or disclosed under such subparagraph shall also apply to returns and return information open to inspection or disclosed under this subparagraph.
 - (C) Disapproval by Joint Committee on Taxation
Returns and return information shall not be open to inspection or disclosed under subparagraph (A) or (B) with respect to an audit -
- (i) unless the Comptroller General of the United States notifies in writing the Joint Committee on Taxation of such audit, and
- (ii) if the Joint Committee on Taxation disapproves such audit by a vote of at least two-thirds of its members within the 30-day period beginning on the day the Joint Committee on Taxation receives such notice.

- (j) Statistical use
 - (1) Department of Commerce

Upon request in writing by the Secretary of Commerce, the Secretary shall furnish -

 - (A) such returns, or return information reflected thereon, to officers and employees of the Bureau of the Census, and
 - (B) such return information reflected on returns of corporations to officers and employees of the Bureau of Economic Analysis,
as the Secretary may prescribe by regulation for the purpose of, but only to the extent necessary in, the structuring of censuses and national economic accounts and conducting related statistical activities authorized by law.
 - (2) Federal Trade Commission

Upon request in writing by the Chairman of the Federal Trade Commission, the Secretary shall furnish such return information reflected on any return of a corporation with respect to the tax imposed by chapter 1 to officers and employees of the Division of Financial Statistics of the Bureau of Economics of such commission as the Secretary may prescribe by regulation for the purpose of, but only to the extent necessary in, administration by such division of legally authorized economic surveys of corporations.
 - (3) Department of Treasury

Returns and return information shall be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for the purpose of, but only to the extent necessary in, preparing economic or financial forecasts, projections, analyses, and statistical studies and conducting related activities. Such inspection or disclosure shall be permitted only upon written request which sets forth the specific reason or reasons why such inspection or disclosure is necessary and which is signed by the head of the bureau or office of the Department of the Treasury requesting the inspection or disclosure.
 - (4) Anonymous form

No person who receives a return or return information under this subsection shall disclose such return or return information to any person other than the taxpayer to whom it relates except in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.
- (k) Disclosure of certain returns and return information for tax administration purposes
 - (1) Disclosure of accepted offers-in-compromise

Return information shall be disclosed to members of the general public to the extent necessary to permit inspection of any accepted offer-in-compromise under section 7122 relating to the liability for a tax imposed by this title.

- (2) Disclosure of amount of outstanding lien
If a notice of lien has been filed pursuant to section 6323(f), the amount of the outstanding obligation secured by such lien may be disclosed to any person who furnishes satisfactory written evidence that he has a right in the property subject to such lien or intends to obtain a right in such property.
- (3) Disclosure of return information to correct misstatements of fact
The Secretary may, but only following approval by the Joint Committee on Taxation, disclose such return information or any other information with respect to any specific taxpayer to the extent necessary for tax administration purposes to correct a misstatement of fact published or disclosed with respect to such taxpayer's return or any transaction of the taxpayer with the Internal Revenue Service.
- (4) Disclosure of competent authority under income tax convention
A return or return information may be disclosed to a competent authority of a foreign government which has an income tax or gift and estate tax convention, or other convention or bilateral agreement relating to the exchange of tax information, with the United States but only to the extent provided in, and subject to the terms and conditions of, such convention or bilateral agreement.
- (5) State agencies regulating tax return preparers
Taxpayer identity information with respect to any income tax return preparer, and information as to whether or not any penalty has been assessed against such income tax return preparer under section 6694, 6695, or 7216, may be furnished to any agency, body, or commission lawfully charged under any State or local law with the licensing, registration, or regulation of income tax return preparers. Such information may be furnished only upon written request by the head of such agency, body, or commission designating the officers or employees to whom such information is to be furnished. Information may be furnished and used under this paragraph only for purposes of the licensing, registration, or regulation of income tax return preparers.
- (6) Disclosure by internal revenue officers and employees for investigative purposes
An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the

Secretary may prescribe by regulation.

- (7) Disclosure of excise tax registration information
To the extent the Secretary determines that disclosure is necessary to permit the effective administration of subtitle D, the Secretary may disclose -
 - (A) the name, address, and registration number of each person who is registered under any provision of subtitle D (and, in the case of a registered terminal operator, the address of each terminal operated by such operator), and
 - (B) the registration status of any person.
- (I) Disclosure of returns and return information for purposes other than tax administration
 - (1) Disclosure of certain returns and return information to Social Security Administration and Railroad Retirement Board
The Secretary may, upon written request, disclose returns and return information with respect to -
 - (A) taxes imposed by chapters 2, 21, and 24, to the Social Security Administration for purposes of its administration of the Social Security Act;
 - (B) a plan to which part I of subchapter D of chapter 1 applies, to the Social Security Administration for purposes of carrying out its responsibility under section 1131 of the Social Security Act, limited, however to return information described in section 6057(d); and
 - (C) taxes imposed by chapter 22, to the Railroad Retirement Board for purposes of its administration of the Railroad Retirement Act.
 - (2) Disclosure of returns and return information to the Department of Labor and Pension Benefit Guaranty Corporation
The Secretary may, upon written request, furnish returns and return information to the proper officers and employees of the Department of Labor and the Pension Benefit Guaranty Corporation for purposes of, but only to the extent necessary in, the administration of titles I and IV of the Employee Retirement Income Security Act of 1974.
 - (3) Disclosure that applicant for Federal loan has tax delinquent account
 - (A) In general
Upon written request, the Secretary may disclose to the head of the Federal agency administering any included Federal loan program whether or not an applicant for a loan under such program has a tax delinquent account.
 - (B) Restriction on disclosure
Any disclosure under subparagraph (A) shall be made only for the purpose of, and to the extent necessary in, determining the creditworthiness of the applicant for the loan in question.
 - (C) Included Federal loan program defined
For purposes of this paragraph, the term "included Federal

loan program" means any program under which the United States or a Federal agency makes, guarantees, or insures loans.

- (4) Disclosure of returns and return information for use in personnel or claimant representative matters
The Secretary may disclose returns and return information -
 - (A) upon written request -
 - (i) to an employee or former employee of the Department of the Treasury, or to the duly authorized legal representative of such employee or former employee, who is or may be a party to any administrative action or proceeding affecting the personnel rights of such employee or former employee; or
 - (ii) to any person, or to the duly authorized legal representative of such person, whose rights are or may be affected by an administrative action or proceeding under section 330 of title 31, United States Code, solely for use in the action or proceeding, or in preparation for the action or proceeding, but only to the extent that the Secretary determines that such returns or return information is or may be relevant and material to the action or proceeding; or
 - (B) to officers and employees of the Department of the Treasury for use in any action or proceeding described in subparagraph (A), or in preparation for such action or proceeding, to the extent necessary to advance or protect the interests of the United States.
- (5) Social Security Administration
Upon written request by the Commissioner of Social Security, the Secretary may disclose information returns filed pursuant to part III of subchapter A of chapter 61 of this subtitle for the purpose of -
 - (A) carrying out, in accordance with an agreement entered into pursuant to section 232 of the Social Security Act, an effective return processing program; or
 - (B) providing information regarding the mortality status of individuals for epidemiological and similar research in accordance with section 1106(d) of the Social Security Act.
- (6) Disclosure of return information to Federal, State, and local child support enforcement agencies
 - (A) Return information from Internal Revenue Service
The Secretary may, upon written request, disclose to the appropriate Federal, State, or local child support enforcement agency -
 - (i) available return information from the master files of the Internal Revenue Service relating to the social security account number (or numbers, if the individual involved has more than one such number), address, filing status, amounts and nature of income, and the number of dependents reported on any return filed by, or with respect to, any individual with respect to whom child support obligations are sought to

be established or enforced pursuant to the provisions of part D of title IV of the Social Security Act and with respect to any individual to whom such support obligations are owing, and

- (ii) available return information reflected on any return filed by, or with respect to, any individual described in clause (i) relating to the amount of such individual's gross income (as defined in section 61) or consisting of the names and addresses of payors of such income and the names of any dependents reported on such return, but only if such return information is not reasonably available from any other source.
 - (B) Disclosure to certain agents
The following information disclosed to any child support enforcement agency under subparagraph (A) with respect to any individual with respect to whom child support obligations are sought to be established or enforced may be disclosed by such agency to any agent of such agency which is under contract with such agency to carry out the purposes described in subparagraph (C):
 - (i) The address and social security account number (or numbers) of such individual.
 - (ii) The amount of any reduction under section 6402(c) (relating to offset of past-due support against overpayments) in any overpayment otherwise payable to such individual.
 - (C) Restriction on disclosure
Information may be disclosed under this paragraph only for purposes of, and to the extent necessary in, establishing and collecting child support obligations from, and locating, individuals owing such obligations.
 - (7) Disclosure of return information to Federal, State, and local agencies administering certain programs under the Social Security Act, the Food Stamp Act of 1977, or title 38, United States Code, or certain housing assistance programs
 - (A) Return information from Social Security Administration
The Commissioner of Social Security shall, upon written request, disclose return information from returns with respect to net earnings from self-employment (as defined in section 1402), wages (as defined in section 3121(a) or 3401(a)), and payments of retirement income, which have been disclosed to the Social Security Administration as provided by paragraph (1) or
 - (5) of this subsection, to any Federal, State, or local agency administering a program listed in subparagraph (D).
 - (B) Return information from Internal Revenue Service
The Secretary shall, upon written request, disclose current return information from returns with respect to unearned income from the Internal Revenue Service files to any Federal, State, or local agency administering a program listed in subparagraph

(D).

- (C) Restriction on disclosure

The Commissioner of Social Security and the Secretary shall disclose return information under subparagraphs (A) and (B) only for purposes of, and to the extent necessary in, determining eligibility for, or the correct amount of, benefits under a program listed in subparagraph (D).

- (D) Programs to which rule applies

The programs to which this paragraph applies are:

- (i) a State program funded under part A of title IV of the Social Security Act;
- (ii) medical assistance provided under a State plan approved under title XIX of the Social Security Act;
- (iii) supplemental security income benefits provided under title XVI of the Social Security Act, and federally administered supplementary payments of the type described in section 1616(a) of such Act (including payments pursuant to an agreement entered into under section 212(a) of Public Law 93-66);
- (iv) any benefits provided under a State plan approved under title I, X, XIV, or XVI of the Social Security Act (as those titles apply to Puerto Rico, Guam, and the Virgin Islands);
- (v) unemployment compensation provided under a State law described in section 3304 of this title;
- (vi) assistance provided under the Food Stamp Act of 1977;
- (vii) State-administered supplementary payments of the type described in section 1616(a) of the Social Security Act (including payments pursuant to an agreement entered into under section 212(a) of Public Law 93-66);
- (viii)
 - (I) any needs-based pension provided under chapter 15 of title 38, United States Code, or under any other law administered by the Secretary of Veterans Affairs;
 - (II) parents' dependency and indemnity compensation provided under section 1315 of title 38, United States Code;
 - (III) health-care services furnished under section 1710(a)(1)(I), 1710(a)(2), 1710(b), and 1712(a)(2)(B) of such title; and
 - (IV) compensation paid under chapter 11 of title 38, United States Code, at the 100 percent rate based solely on unemployability and without regard to the fact that the disability or disabilities are not rated as 100 percent disabling under the rating schedule; and
- (ix) any housing assistance program administered by the Department of Housing and Urban Development that involves initial and periodic review of an applicant's or participant's income, except that return information may be

disclosed under this clause only on written request by the Secretary of Housing and Urban Development and only for use by officers and employees of the Department of Housing and Urban Development with respect to applicants for and participants in such programs.

Only return information from returns with respect to net earnings from self-employment and wages may be disclosed under this paragraph for use with respect to any program described in clause (viii)(IV). Clause (viii) shall not apply after September 30, 1998. Clause (ix) shall not apply after September 30, 1998.

- (8) Disclosure of certain return information by Social Security Administration to State and local child support enforcement agencies
 - (A) In general
Upon written request, the Commissioner of Social Security shall disclose directly to officers and employees of a State or local child support enforcement agency return information from returns with respect to social security account numbers, net earnings from self-employment (as defined in section 1402), wages (as defined in section 3121(a) or 3401(a)), and payments of retirement income which have been disclosed to the Social Security Administration as provided by paragraph (1) or (5) of this subsection.
 - (B) Restriction on disclosure
The Commissioner of Social Security shall disclose return information under subparagraph (A) only for purposes of, and to the extent necessary in, establishing and collecting child support obligations from, and locating, individuals owing such obligations. For purposes of the preceding sentence, the term "child support obligations" only includes obligations which are being enforced pursuant to a plan described in section 454 of the Social Security Act which has been approved by the Secretary of Health and Human Services under part D of title IV of such Act.
 - (C) State or local child support enforcement agency
For purposes of this paragraph, the term "State or local child support enforcement agency" means any agency of a State or political subdivision thereof operating pursuant to a plan described in subparagraph (B).
- (9) Disclosure of alcohol fuel producers to administrators of State alcohol laws
Notwithstanding any other provision of this section, the Secretary may disclose -
 - (A) the name and address of any person who is qualified to produce alcohol for fuel use under section 5181, and
 - (B) the location of any premises to be used by such person in producing alcohol for fuel,

to any State agency, body, or commission, or its legal representative, which is charged under the laws of such State with responsibility for administration of State alcohol laws solely for use in the administration of such laws.

- (10) Disclosure of certain information to agencies requesting a reduction under section 6402(c) or 6402(d)
 - (A) Return information from Internal Revenue Service
The Secretary may, upon receiving a written request, disclose to officers and employees of any agency seeking a reduction under subsection (c), (d), or (e) of section 6402 and to officers and employees of the Department of the Treasury in connection with such reduction -
- (i) taxpayer identity information with respect to the taxpayer against whom such a reduction was made or not made and with respect to any other person filing a joint return with such taxpayer,
- (ii) the fact that a reduction has been made or has not been made under such subsection with respect to such taxpayer,
- (iii) the amount of such reduction,
- (iv) whether such taxpayer filed a joint return, and
- (v) the fact that a payment was made (and the amount of the payment) to the spouse of the taxpayer on the basis of a joint return.
- (B) Restriction on use of disclosed information
Any officers and employees of an agency receiving return information under subparagraph (A) shall use such information only for the purposes of, and to the extent necessary in, establishing appropriate agency records, locating any person with respect to whom a reduction under subsection (c), (d), or
 - (e) of section 6402 is sought for purposes of collecting the debt with respect to which the reduction is sought, or in the defense of any litigation or administrative procedure ensuing from a reduction made under subsection (c), (d), or (e) of section 6402. Any return information disclosed with respect to section 6402(e) shall only be disclosed to officers and employees of the State agency requesting such information.
- (11) Disclosure of return information to carry out Federal Employees' Retirement System
- (A) In general
The Commissioner of Social Security shall, on written request, disclose to the Office of Personnel Management return information from returns with respect to net earnings from self-employment (as defined in section 1402), wages (as defined in section 3121(a) or 3401(a)), and payments of retirement income, which have been disclosed to the Social Security Administration as provided by paragraph (1) or (5).
- (B) Restriction on disclosure

The Commissioner of Social Security shall disclose return information under subparagraph (A) only for purposes of, and to the extent necessary in, the administration of chapters 83 and 84 of title 5, United States Code.

- (12) Disclosure of certain taxpayer identity information for verification of employment status of medicare beneficiary and spouse of medicare beneficiary
- (A) Return information from Internal Revenue Service
The Secretary shall, upon written request from the Commissioner of Social Security, disclose to the Commissioner available filing status and taxpayer identity information from the individual master files of the Internal Revenue Service relating to whether any medicare beneficiary identified by the Commissioner was a married individual (as defined in section 7703) for any specified year after 1986, and, if so, the name of the spouse of such individual and such spouse's TIN.
- (B) Return information from Social Security Administration
The Commissioner of Social Security shall, upon written request from the Administrator of the Health Care Financing Administration, disclose to the Administrator the following information:
 - (i) The name and TIN of each medicare beneficiary who is identified as having received wages (as defined in section 3401(a)), above an amount (if any) specified by the Secretary of Health and Human Services, from a qualified employer in a previous year.
 - (ii) For each medicare beneficiary who was identified as married under subparagraph (A) and whose spouse is identified as having received wages, above an amount (if any) specified by the Secretary of Health and Human Services, from a qualified employer in a previous year -
 - (I) the name and TIN of the medicare beneficiary, and
 - (II) the name and TIN of the spouse.
 - (iii) With respect to each such qualified employer, the name, address, and TIN of the employer and the number of individuals with respect to whom written statements were furnished under section 6051 by the employer with respect to such previous year.
 - (C) Disclosure by Health Care Financing Administration
With respect to the information disclosed under subparagraph (B), the Administrator of the Health Care Financing Administration may disclose -
 - (i) to the qualified employer referred to in such subparagraph the name and TIN of each individual identified under such subparagraph as having received wages from the employer (hereinafter in this subparagraph referred to as the "employee") for purposes of determining during what period such employee or the employee's spouse may be (or have been)

covered under a group health plan of the employer and what benefits are or were covered under the plan (including the name, address, and identifying number of the plan),

- (ii) to any group health plan which provides or provided coverage to such an employee or spouse, the name of such employee and the employee's spouse (if the spouse is a medicare beneficiary) and the name and address of the employer, and, for the purpose of presenting a claim to the plan -
 - (I) the TIN of such employee if benefits were paid under title XVIII of the Social Security Act with respect to the employee during a period in which the plan was a primary plan (as defined in section 1862(b)(2)(A) of the Social Security Act), and
 - (II) the TIN of such spouse if benefits were paid under such title with respect to the spouse during such period, and
- (iii) to any agent of such Administrator the information referred to in subparagraph (B) for purposes of carrying out clauses (i) and (ii) on behalf of such Administrator.
 - (D) Special rules
- (i) Restrictions on disclosure
Information may be disclosed under this paragraph only for purposes of, and to the extent necessary in, determining the extent to which any medicare beneficiary is covered under any group health plan.
- (ii) Timely response to requests
Any request made under subparagraph (A) or (B) shall be complied with as soon as possible but in no event later than 120 days after the date the request was made.
 - (E) Definitions
For purposes of this paragraph -
- (i) Medicare beneficiary
The term "medicare beneficiary" means an individual entitled to benefits under part A, or enrolled under part B, of title XVIII of the Social Security Act, but does not include such an individual enrolled in part A under section 1818.
- (ii) Group health plan
The term "group health plan" means any group health plan (as defined in section 5000(b)(1)).
- (iii) Qualified employer
The term "qualified employer" means, for a calendar year, an employer which has furnished written statements under section 6051 with respect to at least 20 individuals for wages paid in the year.
 - (F) Termination
Subparagraphs (A) and (B) shall not apply to -

- (i) any request made after September 30, 1998, and
- (ii) any request made before such date for information relating to -
 - (I) 1997 or thereafter in the case of subparagraph (A),
or
 - (II) 1998 or thereafter in the case of subparagraph (B).
 - (13) Disclosure of return information to carry out income contingent repayment of student loans
 - (A) In general
The Secretary may, upon written request from the Secretary of Education, disclose to officers and employees of the Department of Education return information with respect to a taxpayer who has received an applicable student loan and whose loan repayment amounts are based in whole or in part on the taxpayer's income. Such return information shall be limited to
- (i) taxpayer identity information with respect to such taxpayer,
- (ii) the filing status of such taxpayer, and
- (iii) the adjusted gross income of such taxpayer.
 - (B) Restriction on use of disclosed information
Return information disclosed under subparagraph (A) may be used by officers and employees of the Department of Education only for the purposes of, and to the extent necessary in, establishing the appropriate income contingent repayment amount for an applicable student loan.
 - (C) Applicable student loan
For purposes of this paragraph, the term "applicable student loan" means -
- (i) any loan made under the program authorized under part D of title IV of the Higher Education Act of 1965, and
- (ii) any loan made under part B or E of title IV of the Higher Education Act of 1965 which is in default and has been assigned to the Department of Education.
 - (D) Termination
This paragraph shall not apply to any request made after September 30, 1998.
 - (14) Disclosure of return information to United States Customs Service
The Secretary may, upon written request from the Commissioner of the United States Customs Service, disclose to officers and employees of the Department of the Treasury such return information with respect to taxes imposed by chapters 1 and 6 as the Secretary may prescribe by regulations, solely for the purpose of, and only to the extent necessary in -
 - (A) ascertaining the correctness of any entry in audits as provided for in section 509 of the Tariff Act of 1930 (19 U.S.C. 1509), or

- (B) other actions to recover any loss of revenue, or to collect duties, taxes, and fees, determined to be due and owing pursuant to such audits.
 - (15) Disclosure of returns filed under section 6050I
The Secretary may, upon written request, disclose to officers and employees of -
- (A) any Federal agency,
- (B) any agency of a State or local government, or
- (C) any agency of the government of a foreign country, information contained on returns filed under section 6050I. Any such disclosure shall be made on the same basis, and subject to the same conditions, as apply to disclosures of information on reports filed under section 5313 of title 31, United States Code; except that no disclosure under this paragraph shall be made for purposes of the administration of any tax law.
 - (m) Disclosure of taxpayer identity information
 - (1) Tax refunds
The Secretary may disclose taxpayer identity information to the press and other media for purposes of notifying persons entitled to tax refunds when the Secretary, after reasonable effort and lapse of time, has been unable to locate such persons.
 - (2) Federal claims
- (A) In general
Except as provided in subparagraph (B), the Secretary may, upon written request, disclose the mailing address of a taxpayer for use by officers, employees, or agents of a Federal agency for purposes of locating such taxpayer to collect or compromise a Federal claim against the taxpayer in accordance with sections 3711, 3717, and 3718 of title 31.
- (B) Special rule for consumer reporting agency
In the case of an agent of a Federal agency which is a consumer reporting agency (within the meaning of section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f))), the mailing address of a taxpayer may be disclosed to such agent under subparagraph (A) only for the purpose of allowing such agent to prepare a commercial credit report on the taxpayer for use by such Federal agency in accordance with sections 3711, 3717, and 3718 of title 31.
 - (3) National Institute for Occupational Safety and Health
Upon written request, the Secretary may disclose the mailing address of taxpayers to officers and employees of the National Institute for Occupational Safety and Health solely for the purpose of locating individuals who are, or may have been, exposed to occupational hazards in order to determine the status of their health or to inform them of the possible need for medical care and treatment.
 - (4) Individuals who owe an overpayment of Federal Pell Grants or who have defaulted on student loans administered by the

Department of Education

- (A) In general
Upon written request by the Secretary of Education, the Secretary may disclose the mailing address of any taxpayer -
- (i) who owes an overpayment of a grant awarded to such taxpayer under subpart 1 of part A of title IV of the Higher Education Act of 1965, or
- (ii) who has defaulted on a loan -
 - (I) made under part B, D, or E of title IV of the Higher Education Act of 1965, or
 - (II) made pursuant to section 3(a)(1) of the Migration and Refugee Assistance Act of 1962 to a student at an institution of higher education, for use only by officers, employees, or agents of the Department of Education for purposes of locating such taxpayer for purposes of collecting such overpayment or loan.
- (B) Disclosure to educational institutions, etc.
Any mailing address disclosed under subparagraph (A)(i) may be disclosed by the Secretary of Education to -
- (i) any lender, or any State or nonprofit guarantee agency, which is participating under part B or D of title IV of the Higher Education Act of 1965, or
- (ii) any educational institution with which the Secretary of Education has an agreement under subpart 1 of part A, or part D or E, of title IV of such Act, for use only by officers, employees, or agents of such lender, guarantee agency, or institution whose duties relate to the collection of student loans for purposes of locating individuals who have defaulted on student loans made under such loan programs for purposes of collecting such loans.
 - (5) Individuals who have defaulted on student loans administered by the Department of Health and Human Services
 - (A) In general
Upon written request by the Secretary of Health and Human Services, the Secretary may disclose the mailing address of any taxpayer who has defaulted on a loan made under part C III of title VII of the Public Health Service Act or under subpart II of part B of title VIII of such Act, for use only by officers, employees, or agents of the Department of Health and Human Services for purposes of locating such taxpayer for purposes of collecting such loan.
 - (B) Disclosure to schools and eligible lenders
Any mailing address disclosed under subparagraph (A) may be disclosed by the Secretary of Health and Human Services to -
- (i) any school with which the Secretary of Health and Human Services has an agreement under subpart II III of part C of title VII of the Public Health Service Act or subpart II of part B of title VIII of such Act, or

- (ii) any eligible lender (within the meaning of section 737(4) [] of such Act) participating under subpart I [] of part C of title VII of such Act, for use only by officers, employees, or agents of such school or eligible lender whose duties relate to the collection of student loans for purposes of locating individuals who have defaulted on student loans made under such subparts for the purposes of collecting such loans.
 - (6) Blood Donor Locator Service
 - (A) In general

Upon written request pursuant to section 1141 of the Social Security Act, the Secretary shall disclose the mailing address of taxpayers to officers and employees of the Blood Donor Locator Service in the Department of Health and Human Services.
 - (B) Restriction on disclosure

The Secretary shall disclose return information under subparagraph (A) only for purposes of, and to the extent necessary in, assisting under the Blood Donor Locator Service authorized persons (as defined in section 1141(h)(1) of the Social Security Act) in locating blood donors who, as indicated by donated blood or products derived therefrom or by the history of the subsequent use of such blood or blood products, have or may have the virus for acquired immune deficiency syndrome, in order to inform such donors of the possible need for medical care and treatment.
 - (C) Safeguards

The Secretary shall destroy all related blood donor records (as defined in section 1141(h)(2) of the Social Security Act) in the possession of the Department of the Treasury upon completion of their use in making the disclosure required under subparagraph (A), so as to make such records undisclosable.
 - (7) Social security account statement furnished by Social Security Administration

Upon written request by the Commissioner of Social Security, the Secretary may disclose the mailing address of any taxpayer who is entitled to receive a social security account statement pursuant to section 1143(c) of the Social Security Act, for use only by officers, employees or agents of the Social Security Administration for purposes of mailing such statement to such taxpayer.

 - (n) Certain other persons

Pursuant to regulations prescribed by the Secretary, returns and return information may be disclosed to any person, including any person described in section 7513(a), to the extent necessary in connection with the processing, storage, transmission, and reproduction of such returns and return information, the programming, maintenance, repair, testing, and procurement of equipment, and the providing of other services, for purposes of tax administration.

- (o) Disclosure of returns and return information with respect to certain taxes
- (1) Taxes imposed by subtitle E
Returns and return information with respect to taxes imposed by subtitle E (relating to taxes on alcohol, tobacco, and firearms) shall be open to inspection by or disclosure to officers and employees of a Federal agency whose official duties require such inspection or disclosure.
- (2) Taxes imposed by chapter 35
Returns and return information with respect to taxes imposed by chapter 35 (relating to taxes on wagering) shall, notwithstanding any other provision of this section, be open to inspection by or disclosure only to such person or persons and for such purpose or purposes as are prescribed by section 4424.
 - (p) Procedure and recordkeeping
- (1) Manner, time, and place of inspections
Requests for the inspection or disclosure of a return or return information and such inspection or disclosure shall be made in such manner and at such time and place as shall be prescribed by the Secretary.
- (2) Procedure
 - (A) Reproduction of returns
A reproduction or certified reproduction of a return shall, upon written request, be furnished to any person to whom disclosure or inspection of such return is authorized under this section. A reasonable fee may be prescribed for furnishing such reproduction or certified reproduction.
 - (B) Disclosure of return information
Return information disclosed to any person under the provisions of this title may be provided in the form of written documents, reproductions of such documents, films or photoimpressions, or electronically produced tapes, disks, or records, or by any other mode or means which the Secretary determines necessary or appropriate. A reasonable fee may be prescribed for furnishing such return information.
 - (C) Use of reproductions
Any reproduction of any return, document, or other matter made in accordance with this paragraph shall have the same legal status as the original, and any such reproduction shall, if properly authenticated, be admissible in evidence in any judicial or administrative proceeding as if it were the original, whether or not the original is in existence.
- (3) Records of inspection and disclosure
 - (A) System of recordkeeping
Except as otherwise provided by this paragraph, the Secretary shall maintain a permanent system of standardized records or accountings of all requests for inspection or disclosure of returns and return information (including the reasons for and

dates of such requests) and of returns and return information inspected or disclosed under this section. Notwithstanding the provisions of section 552a(c) of title 5, United States Code, the Secretary shall not be required to maintain a record or accounting of requests for inspection or disclosure of returns and return information, or of returns and return information inspected or disclosed, under the authority of subsections (c),

- () System of recordkeeping

- () System of recordkeeping

- accountings required to be maintained under this paragraph shall be available for examination by the Joint Committee on Taxation or the Chief of Staff of such joint committee. Such record or accounting shall also be available for examination by such person or persons as may be, but only to the extent, authorized to make such examination under section 552a(c)(3) of title 5, United States Code.

- (B) Report by the Secretary

- The Secretary shall, within 90 days after the close of each calendar year, furnish to the Joint Committee on Taxation a report with respect to, or summary of, the records or accountings described in subparagraph (A) in such form and containing such information as such joint committee or the Chief of Staff of such joint committee may designate. Such report or summary shall not, however, include a record or accounting of any request by the President under subsection (g)

- for, or the disclosure in response to such request of, any return or return information with respect to any individual who, at the time of such request, was an officer or employee of the executive branch of the Federal Government. Such report or summary, or any part thereof, may be disclosed by such joint committee to such persons and for such purposes as the joint committee may, by record vote of a majority of the members of the joint committee, determine.

- (C) Public report on disclosures

- The Secretary shall, within 90 days after the close of each calendar year, furnish to the Joint Committee on Taxation for disclosure to the public a report with respect to the records or accountings described in subparagraph (A) which -

- (i) provides with respect to each Federal agency, each agency, body, or commission described in subsection (d),

- () provides with respect to each Federal agency, each the number of -

- (I) requests for disclosure of returns and return

- information,
- (II) instances in which returns and return information were disclosed pursuant to such requests or otherwise,
- (III) taxpayers whose returns, or return information with respect to whom, were disclosed pursuant to such requests, and
- (ii) describes the general purposes for which such requests were made, [2]
 - (4) Safeguards
 - Any Federal agency described in subsection (h)(2), (h)(6),
 - (i) Safeguards
 - (i) Safeguards
 - any agency, body, or commission described in subsection (d),
 - (i) Safeguards
 - condition for receiving returns or return information -
 - (A) establish and maintain, to the satisfaction of the Secretary, a permanent system of standardized records with respect to any request, the reason for such request, and the date of such request made by or of it and any disclosure of return or return information made by or to it;
 - (B) establish and maintain, to the satisfaction of the Secretary, a secure area or place in which such returns or return information shall be stored;
 - (C) restrict, to the satisfaction of the Secretary, access to the returns or return information only to persons whose duties or responsibilities require access and to whom disclosure may be made under the provisions of this title;
 - (D) provide such other safeguards which the Secretary determines (and which he prescribes in regulations) to be necessary or appropriate to protect the confidentiality of the returns or return information;
 - (E) furnish a report to the

Secretary, at such time and containing such information as the Secretary may prescribe, which describes the procedures established and utilized by such agency, body, or commission or the General Accounting Office for ensuring the confidentiality of returns and return information required by this paragraph; and

- (F) upon completion of use of such returns or return information -
 - (i) in the case of an agency, body, or commission described in subsection (d), (i)(3)(B)(i), or (l)(6), (7), (8), or (9) return to the Secretary such returns or return information (along with any copies made therefrom) or make such returns or return information undisclosable in any manner and furnish a written report to the Secretary describing such manner,
 - (ii) in the case of an agency described in subsections (h)(2), (h)(6), (i)(1), (2), (3), or (5), (j)(1) or (2), or (o)(1), ^[3] or the General Accounting Office, either -
 - (I) return to the Secretary such returns or return information (along with any copies made therefrom),
 - (II) otherwise make such returns or return information undisclosable, or
 - (III) to the extent not so returned or made undisclosable, ensure that the conditions of subparagraphs (A), (B), (C), (D), and (E) of this paragraph continue to be met with respect to such returns or return information, and
 - (iii) in the case of the Department of Health and Human

Services for purposes of subsection (m)(6),
destroy all such
return information upon completion of its use in
providing
the notification for which the information was
obtained, so
as to make such information undisclosable;
except that the conditions of subparagraphs (A),
(B), (C), (D),
and (E) shall cease to apply with respect to any
return or return
information if, and to the extent that, such return
or return
information is disclosed in the course of any
judicial or
administrative proceeding and made a part of the
public record
thereof. If the Secretary determines that any such
agency, body,
or commission or the General Accounting Office
has failed to, or
does not, meet the requirements of this
paragraph, he may, after
any proceedings for review established under
paragraph (7), take
such actions as are necessary to ensure such
requirements are
met, including refusing to disclose returns or
return information
to such agency, body, or commission or the
General Accounting
Office until he determines that such requirements
have been or
will be met. In the case of any agency which
receives any
mailing address under paragraph (2), (4), (6), or
(7) of
subsection (m) and which discloses any such
mailing address to
any agent or which receives any information
under paragraph
(6)(A) or (12)(B) of subsection (l) and which
discloses any such
information to any agent, this paragraph shall
apply to such
agency and each such agent (except that, in the
case of an agent,
any report to the Secretary or other action with

respect to the
Secretary shall be made or taken through such
agency). For
purposes of applying this paragraph in any case
to which
subsection (m)(6) applies, the term "return
information"
includes related blood donor records (as defined
in section

1141(h)(2) of the Social Security Act).

- (5) Report on procedures and safeguards
After the close of each calendar year, the
Secretary shall
furnish to each committee described in
subsection (f)(1) a report
which describes the procedures and
safeguards established and
utilized by such agencies, bodies, or
commissions and the General
Accounting Office for ensuring the
confidentiality of returns and
return information as required by this
subsection. Such report
shall also describe instances of deficiencies
in, and failure to
establish or utilize, such procedures.
- (6) Audit of procedures and safeguards
 - (A) Audit by Comptroller General
The Comptroller General may audit
the procedures and
safeguards established by such
agencies, bodies, or commissions
pursuant to this subsection to
determine whether such
safeguards and procedures meet the
requirements of this
subsection and ensure the
confidentiality of returns and return
information. The Comptroller
General shall notify the
Secretary before any such audit is
conducted.
 - (B) Records of inspection and
reports by the Comptroller
General
The Comptroller General shall -
- (i) maintain a permanent system of standardized
records and

accountings of returns and return information inspected by officers and employees of the General Accounting Office under subsection (i)(7)(A)(ii) and shall, within 90 days after the close of each calendar year, furnish to the Secretary a report with respect to, or summary of, such records or accountings in such form and containing such information as the Secretary may prescribe, and

- (ii) furnish an annual report to each committee described in subsection (f) and to the Secretary setting forth his findings with respect to any audit conducted pursuant to subparagraph (A).

The Secretary may disclose to the Joint Committee any report furnished to him under clause (i).

- (7) Administrative review

The Secretary shall by regulations prescribe procedures which provide for administrative review of any determination under paragraph (4) that any agency, body, or commission described in subsection (d) has failed to meet the requirements of such paragraph.

- (8) State law requirements

- (A) Safeguards

Notwithstanding any other provision of this section, no return or return information shall be disclosed after December 31, 1978, to any officer or employee of any State which requires a taxpayer to attach to, or include in, any State tax return a copy of any portion of his Federal return, or information reflected on such Federal return, unless such State adopts provisions of law which

protect the confidentiality of the copy of the Federal return (or portion thereof) attached to, or the Federal return information reflected on, such State tax return.

- (B) Disclosure of returns or return information in State returns

Nothing in subparagraph (A) shall be construed to prohibit the disclosure by an officer or employee of any State of any copy of any portion of a Federal return or any information on a Federal return which is required to be attached or included in a State return to another officer or employee of such State (or political subdivision of such State) if such disclosure is specifically authorized by State law.

- (q) Regulations

The Secretary is authorized to prescribe such other regulations as are necessary to carry out the provisions of this section.

Footnotes

[1] See References in Text note below.

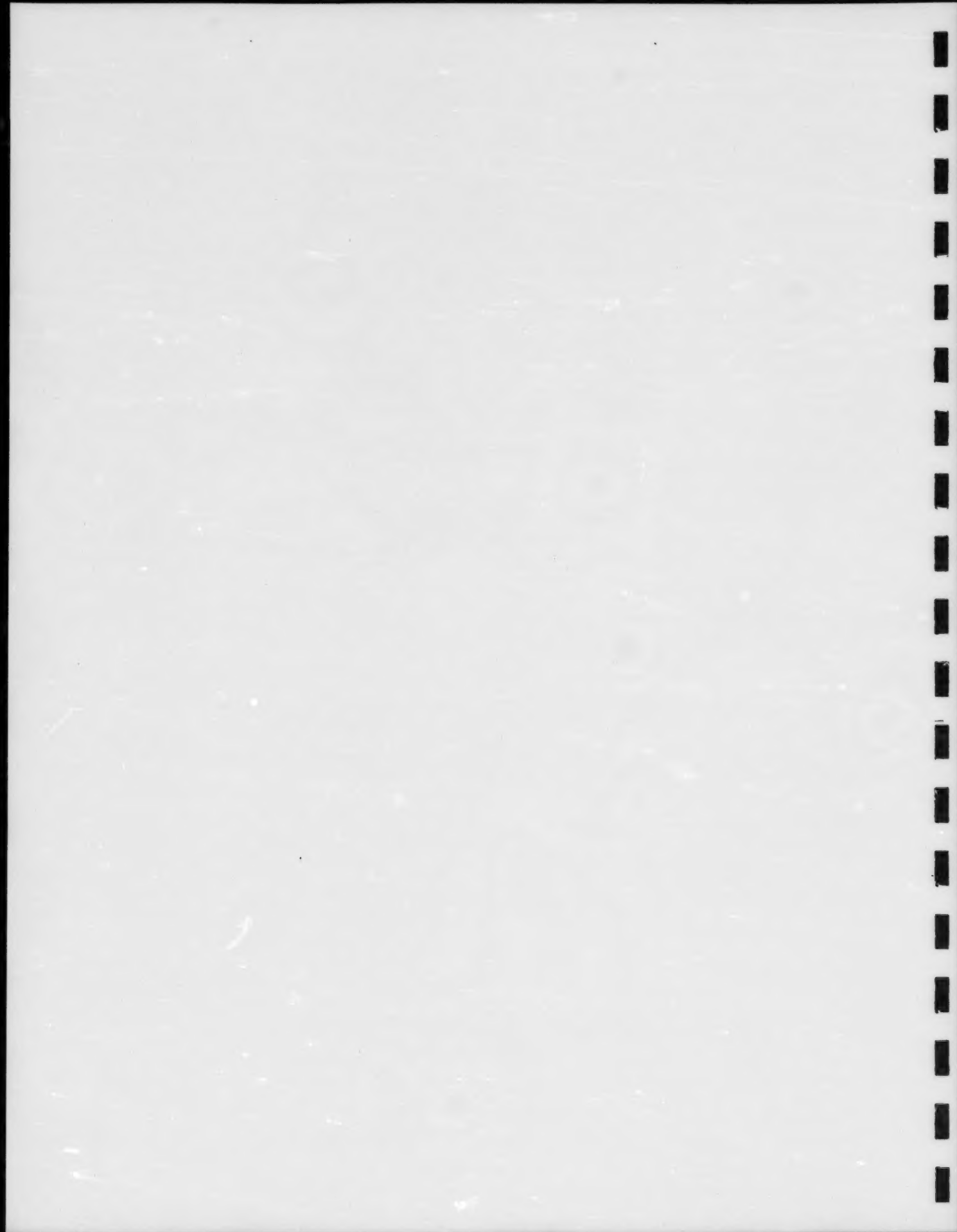
[2] So in original. The comma probably should be a period.

[3] So in original.

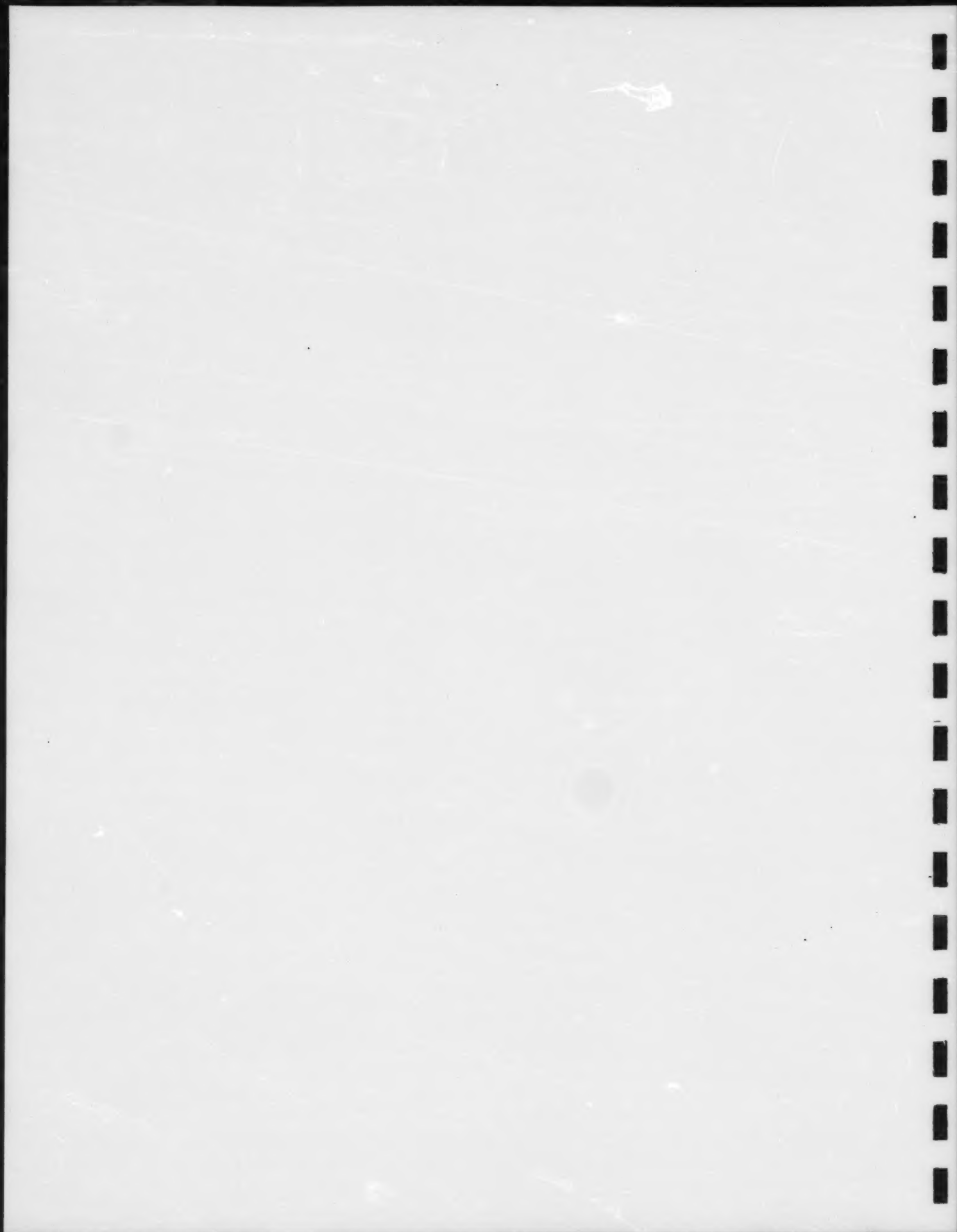
SCHEDULE F

THE CANADIAN EXCHANGE OF INFORMATION GUIDE

THIS DOCUMENT IS NOT PUBLIC AND IS NOT AVAILABLE



SCHEDULE G
THE U.S. FIELD GUIDE



Office of the Assistant Commissioner (International)

Office of International Programs

Tax Treaty Division



Exchange of Information

A Field Guide

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INTRODUCTION

Background

Due to gradual liberalization and globalization of world economies in the past decade, many countries have removed legislative controls on international investment and relaxed foreign exchange regulations. This relaxation of controls has been accomplished through the negotiation of free trade agreements such as the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA). While these agreements have benefited world financial markets, they have also increased the risk of tax avoidance/evasion through international transactions. Therefore, due to the tax implication of these international activities, many countries have signed Tax Treaties or Tax Information Exchange Agreements (TIEA) to provide for an exchange of information in an effort to facilitate tax administration in their respective countries.

Exchange of information is essential for the application of tax treaties or TIEAs to ensure correct application of domestic tax laws. The exchange of information Article in tax treaties clearly states whether exchanges are for both the carrying out of the provisions in the convention and/or the domestic laws of the Contracting States.

The goal and purpose of this Guide is to provide an overview of how the exchange of information provisions in the various tax Conventions are administered by the member states in the Organization for Economic Cooperation and Development (OECD).

The key role of field personnel in the exchange of information process

Exchange of information allows the Competent Authorities of the contracting States to request or provide information necessary for a correct application of tax treaties and to combat tax avoidance and evasion as it relates to the implementation of domestic tax laws covered by the Conventions. Field personnel in Contracting States play a key role in this exchange of information process since it is they who initially decide what information to request and when. They also have, in most countries, the duty to collect the information requested by a treaty partner according to the instructions of the designated Competent Authority. Finally, it is field personnel who must also recognize when information may be useful to a treaty partner and thus provide it on a spontaneous basis through the Competent Authority.

It is important that an exchange of information be processed timely due to statute of limitation implications. The information is of no value if the treaty partner can no longer open the tax years concerned. Timely information is useful information that may lead to feedback from the treaty partner that the information received generated tax adjustments. Reciprocity plays an important part in exchange of information and a country receiving useful information is more likely to provide equally useful information.

Legal basis for exchange of information

There are a number of international legal instruments that form the basis for exchange of tax information:

- Bilateral tax conventions, based on the Organization for Economic Cooperation and Development (OECD) Model Convention on Income and Capital - Article 26, The Exchange of Information; or the United Nations Model Double Taxation Convention between Developed and Developing Countries;
- International instruments designed specifically for administrative assistance purposes whether bilateral (Tax Information Exchange Agreements/TIEAs or multilateral (Nordic Convention on Mutual Assistance; the European Community Directive on Mutual Assistance; the Council of Europe/OECD Convention on Mutual Assistance).

The legal instruments through which the United States exchanges information are TIEAs or tax treaties with individual countries based on the U.S. Model Income Tax Convention, currently the September 1996 revision (see Exhibit I for a list of tax conventions and exchange of information agreements).

The authority to exchange information

Direct contacts with foreign tax officials are not allowed unless a delegation of powers is specifically provided. Exchange of information is handled by the Competent Authorities. The treaty partners nominate their own respective Competent Authorities (in the U.S., the Secretary of the Treasury or his representative, the Commissioner of the Internal Revenue Service). The Commissioner has redelegated Competent Authority duties to the Assistant Commissioner (International).

Assistance in criminal tax cases

While the language in the exchange provisions in the conventions does not preclude an exchange of information in possible criminal offenses against the tax laws of a contracting state, there may be additional legal instruments through which an exchange of information is possible when an inquiry or investigation has criminal aspects. For example, in the United States, the Department of Justice (DOJ) can obtain foreign evidence and other types of assistance for criminal tax cases through Mutual Legal Assistance Treaties (MLATs). These treaties, which are concluded in conjunction with the United States Department of State, also provide for assistance under foreign statutes where no formal treaty relationship exists. Accordingly, Contracting States personnel initiating a request for information should inform their respective Competent Authorities of the possible criminal tax aspects of an inquiry or investigation. The basis under which the information will be sought will then be determined by the Competent Authority.

Assistance in tax collection

The OECD Model Tax Convention does not provide for assistance in tax collection by the Competent Authorities on behalf of the other Contracting State. However, some bilateral and/or multilateral conventions do provide that type of tax collection assistance (e.g., Nordic Convention and the Council of Europe/OECD Convention on Mutual Assistance in Tax Matters). Information assisting the Contracting States in collection of domestic taxes covered by the Convention may be exchanged pursuant to Article 26. In the United States, provisions in tax conventions of only five countries provide for assistance in tax collection (Canada, Denmark, France, the Netherlands and Sweden).

IMPLEMENTATION ASPECTS OF EXCHANGE OF INFORMATION

Scope of exchange of information

Examples of the scope of Article 26 are found in the Commentary in Article 26 of the OECD Model Tax Convention (Exhibit II). For example, for the application of Article 12 of the Convention (Royalty Payments), the country of residence may ask the source country the amount of royalties transmitted to one of its residents. The source country may ask the country of the recipient of the royalties whether he is a resident and whether he is the beneficial owner of the royalties in order to be exempt from withholding. Information may also be needed for the proper allocation of profits between associated enterprises in different States or between a head office in one State and a permanent establishment in another State.

In another example, the exchange of information for the application of domestic laws regarding taxes covered by the Convention may be a request for information that includes but is not limited to:

- the fiscal residence on an individual or a company;
- the tax status of a legal entity;
- the nature of income in the source country;
- the income and expenses shown on a tax return;
- business records to determine the amount of commissions paid to a company in another State;
- bank records;
- the price paid for goods in a transaction between independent companies in both States: and
- information in a case of a 'triangular' situation where transactions between two companies, each situated in a Contracting State, and a company in a third State C (where both States A and B have no treaty) which may be a possible tax haven country. In this case, States A and B may exchange information regarding transactions with the company in State C.

Taxpayers covered

Exchange of information is not limited to residents of the Contracting States. Often, the tax administration of one State will have an interest in receiving information on activities carried on in the other State by a particular third country resident because taxation of the latter as a non-resident taxpayer is at issue. However, there may be situations where a Contracting State could have an interest in information about a third country resident who is not a taxpayer in either of the Contracting States; for example, when this information is relevant to the taxation of a third party who is a taxpayer/resident of the requesting State.

Taxes covered

The exchange of information can only concern the taxes covered by the Convention. Therefore, where the Convention applies to taxes on income and capital only, no exchange under the Convention may concern value added or sales taxes or social security contributions. It is important to note, however, that some bilateral tax conventions negotiated by the United States, such as conventions with Mexico and Canada, **do provide** for exchange of information on taxes other than income and capital (e.g.; value added, sales, etc.).

Tax years covered

Time periods in which tax returns may be examined vary from country to country and the beginning of a taxpayer's tax year may not always coincide with the calendar year or a particular fiscal year; see Exhibits III and IV.

Obligation to exchange information

The member states of the OECD Model Convention have agreed that Article 26 implies an obligation to provide an exchange of information, as long as the provisions in the Convention are not contrary to their respective domestic laws.

This obligation takes the form of a 'formal request' from the requesting country Competent Authority; see Exhibit V. The respondent State gathers the information that the requesting State needs in the same manner as they would gather information in their own domestic audit situations. This may include, but is not limited to special investigations, information requests from third-party sources and/or on site examinations of the business accounts as maintained by the taxpayer.

Limitations to exchange of information

Article 26 outlines three situations where Contracting States may not feel obligated to exchange information:

- if the request is at variance with the laws or practice of the Contracting State, (e.g., to supply items of information that are not obtainable under the law in the normal course of administration of the Contracting State);
- if there is a risk of disclosure of business and professional trade secrets; and
- in cases where disclosure of information would be contrary to public policy.

Basis for implementation of exchange of information

The information requested may already be at the disposal of the tax administration of the Contracting State or may require such methods as special investigation, tax examination and/or third-party contacts as noted above. The basis for tax administration is written in each State's fiscal codes and/or tax laws.

In the United States, the Internal Revenue Code (IRC) allows the Internal Revenue Service to administer and carry out its' tax laws. The disclosure provisions are governed by IRC Section 6103, Confidentiality and Disclosure of Return and Return Information. Penalties for unauthorized disclosures are governed by IRC Section 7431, Civil Damages for Unauthorized Disclosure of Returns and Return Information. However, information and actual procedures to carry out tax administration are contained in the Internal Revenue Manual (IRM). Information and procedures on the Exchange of Information Program are outlined specifically in IRM Section 42(10)0, International Enforcement Program. Several IRM sections provide information and outline procedures for requests from both IRS districts and Contracting States' as follows:

- 42(10)9.1 Examination Requests
- 42(10)9.2 Assistant Commissioner (International) Services
- 42(10)(10) International Requests for Information
- 42(10)(10).1 U.S. Competent Authority
- 42(10)(10).3 Office of the Assistant Commissioner (International)
- 42(10)(10).5 Exchange of Information Program - General
- 42(10)(10).6 Specific Requests
- 42(10)(10).61 U.S. Initiated Requests
- 42(10)(10).62 Foreign Initiated Requests

In addition, on a day to day basis. Program Analysts on the Exchange of Information Team (EIT) as well as Revenue Service Representatives located in various Posts around the world process both U.S. and foreign initiated exchange requests.

Tax Identification Numbers

Most OECD member countries assign Tax Identification Numbers (TINs) to their taxpayers. These TINs are used to identify taxpayers and are essential to automated matching programs. The use of TINs therefore, is crucial for processing information received from a treaty partner. In addition, TINs are also important when either making a request, responding to a request, or providing information spontaneously, since it allows identification of the taxpayer quickly to help facilitate information gathering, or use information received. Consequently, Contracting States should provide TINs where possible (for both source country and residence country when known).

In the United States, the official TIN is known as the Social Security Number (SSN). Individual taxpayers are assigned nine digit numbers (xxx-xx-xxxx) by the Social Security Administration. The IRS issues corporate taxpayers and other business organizations (including non-profit organizations) eleven digit (xx-xxxxxxxxxx) Employer Identification Numbers (EIN).

Secrecy provisions

Ordinary tax secrecy protects trade and business secrecy in all countries. Therefore, tax secrecy is the basis for mutual trust and a condition for cooperation between countries. In order to ensure confidentiality of taxpayer and/or tax return information, procedures must be followed to prevent unauthorized disclosure where information may possibly be misused or used for purposes other than tax administration. Information must be kept secret in the same way as information obtained from domestic sources. Sanctions for the violation of such secrecy in Contracting States are governed by the administrative and general laws of that State (e.g.; the IRC as noted above in the case of the United States).

The Competent Authority will determine whether or not to pass on sensitive information. It should be noted however, in some OECD member States, neither the taxpayer and/or third party are allowed to refuse to give information to its tax administration. In the United States, taxpayers may exercise their right to refuse to disclose information. In the case of a summons, however, the Internal Revenue Service may exercise the Government's right to enforce the summons.

Bank secrecy

In most countries, bank and similar institutions are bound by confidentiality and secrecy regulations. However, tax administration in some countries, have the statutory power to override that confidentiality to obtain specific information for tax purposes. Some countries use this power with reserve, while banks in other countries report information automatically to tax authorities. In the United States, the IRS has the statutory power to obtain specific information from bank/credit institutions for tax purposes provided that the information is detailed in an Administrative Summons. Specific details include but are not limited to the following:

- purpose of summons (e.g.; (Contracting State name) income tax liability of);
- name and address of taxpayer;
- tax period(s) covered;
- type of tax (e.g.; Income, value added, etc.);
- authority under which information is requested (e.g. Tax Treaty);
- account number; and
- specific information required (e.g.; signature cards, bank statements, deposit slips, etc.).

With respect to summonses used to secure information in accordance with a foreign initiated request for information, the summons is reviewed and approved by the Associate Chief Counsel

(International) prior to issuance.

Other limitations to exchange of information

Some countries are under the legal obligation to notify the taxpayer named in the exchange request when the tax authorities are about to respond to the request. In the United States, notification to the taxpayer is required where an Administrative Summons is used to obtain information. This notification affords the taxpayer the right to "quash" the summons as noted above. It should be noted that in some countries, in the case of fraud, there is no obligation to notify taxpayers. Also in other countries the notification is postponed until after the exchange of information has been made. In the United States, the taxpayer will not receive notification if it is perceived that the notice will jeopardize the investigation of the case (e.g.; the taxpayer may flee the country to avoid being served with a summons). The Competent Authority should therefore, be aware if notification may have a detrimental effect on the investigation.

It is normal practice in many countries that require banks to supply information only in situations where it is known to tax authorities that a taxpayer has an account with that bank. This implies that general investigations of banks to obtain information about their clients (i.e.; "fishing expeditions") are not permitted and that examination of business accounts maintained by banks may not be used for that purpose. In some cases, bank secrecy laws discourage the request for information from banks by tax authorities even where it is known that the taxpayer has an account at a specific bank. For that reason, the ability to obtain bank information from some countries may be extremely limited.

Disclosure of information received

The information obtained may be disclosed only to persons or authorities involved in the assessment, collection and enforcement of the taxes covered by the Convention (including the prosecution or the determination of appeals) and the information may be used only for such purposes. The information received by the local authorities through the Competent Authorities must be kept confidential. If the secrecy provisions under the domestic laws of a Contracting State are narrower than under the Convention, then the provisions of the Convention will have no consequences. If the domestic rules are broader, however, then the treaty provision will put a restriction on the use of information received from abroad. The local tax authorities are under the obligation to refer to their Competent Authority any issue which may arise concerning the use or disclosure of the information received.

Use of information for other purposes

The information exchanged may not be used for purposes other than those for the tax purpose which gave rise to the information being exchanged. For instance, in countries outside the European Union where the Directive on Mutual Assistance allows the exchange of information on direct taxes and VAT, the information exchanged cannot be used to reassess VAT

if the Article on Exchange of Information in the Convention only covers taxes on income and capital. It cannot be used for non tax purposes. When in doubt about the possibility of using foreign source information, consult the Competent Authority.

In some cases, foreign tax authorities are able to reassess not only income taxes, but also Value Added Tax and import taxes. Several treaties include provisions for the exchange of information for income tax and also VAT purposes. However, when the information that has been requested from a tax authority is also needed to reassess import taxes, the individual making the request should report that situation to the Competent Authority. In such cases, the Competent Authority should request the information from a foreign customs authority in accordance with the provisions of mutual assistance agreements for custom's purposes.

PRACTICAL ASPECTS OF EXCHANGE OF INFORMATION

The purpose of this section is to review a number of practical questions and to offer suggestions for facilitating and expediting the exchange of information process as well as improving the quality of the information exchanged.

Types of exchanges of information

The three main types of exchanges of information are specific, routine and spontaneous.

Specific exchange of information

Specific exchanges involve specific questions relating to a particular case which is currently under examination/investigation.

Routine exchange of information

Routine exchanges involve multiple cases. Typically, these exchanges involve the systematic sending of information concerning specified items of income (interest, dividends, royalties, pensions etc.). The aim of the Contracting States would be to exchange the information in the most efficient way possible, due largely to its volume. The OECD has designed a standard form and format for routine exchanges of information which have proved to be quite useful in processing the information received.

In the United States, information routinely exchanged to treaty partners is obtained from Forms 1042S. These forms are filed with the Philadelphia Service Center on a yearly basis by United States persons that make payments to foreign residents with United States source income.

Spontaneous exchange of information

Information spontaneously exchanged will often be very useful because it concerns information detected and/or selected by a tax official of the supplying State during an audit or investigation. Information is spontaneously exchanged when one of the Contracting States provides this information without it being requested by the other State.

The effectiveness of a spontaneous exchange of information will largely depend on the ability of tax investigators to identify information that may be relevant for a foreign tax administration. A spontaneous exchange requires extra work for the tax investigator without an initial guarantee that the findings are actually going to be relevant for tax purposes. For this reason, it is advisable to concentrate on information which seems promising, for example, because of its general importance or because of the amount of tax involved. Tax investigators should request feedback from the recipient tax administration since it may lead to an adjustment for them. For instance, a foreign tax administration that might provide information relating to

commission fees which were alleged to be paid to one of its residents may actually find that no commission fees were paid and further, it may report to its counterpart which supplied the information the facts of the alleged payment. As a result, the deduction of the commission fees would be denied and the taxable income adjusted accordingly. Other examples of spontaneous exchanges concern fraudulent schemes and payments made to residents.

Other forms of exchange

There are also other forms of exchange besides the traditional ones described above, they are:

Industry-wide exchange of information

An industry-wide exchange of information does not concern a specific taxpayer but an economic sector as a whole, for instance, the pharmaceutical industry or the oil industry. Treaty partners or their representatives meet to discuss the way a particular economic sector operates, the financing schemes, the way prices are determined, the tax evasion trends identified, etc.

Simultaneous tax examinations

A simultaneous tax examination may be defined as an arrangement by two or more countries to examine simultaneously and independently, each on its own territory, the tax affairs of (a) taxpayer(s) in which they have a common or related interest with a view to exchanging any relevant information which they so obtain. The existing differences in statutes of limitations of countries that are member of the OECD are a major obstacle for the selection of cases. Such examinations are particularly useful in the area of transfer pricing and in identifying tax evasion schemes involving tax havens.

Visit of authorized representatives of the competent authorities

A visit to a foreign jurisdiction may be useful to gather information. However, this visit has to be authorized by the foreign jurisdiction, otherwise it would represent a breach of sovereignty. The tax officials must also be authorized representatives of the Competent Authority. This presence abroad may occur in different instances. It may be at the request of the country seeking information, if it is believed it will facilitate the understanding of the request and the gathering of information. It may be at the initiative of the requesting tax administration to reduce the burden of gathering information. In a limited number of countries, authorized representatives of the Competent Authority of the other country may participate in a tax examination. This is often of great value to ascertain a clear picture of business and other relations a resident of a country may have with foreign associates.

Some countries do not allow foreign tax officials to visit their taxpayers in order to gather information for tax or any other purpose. Before requesting permission for a foreign visit, be

sure to ascertain whether or not the foreign country allows foreign tax officials to visit officially.

Sending a request for information to a treaty partner

A request for a specific exchange of information will usually be presented only after every effort has first been made through regular domestic administrative means to obtain the information in the requesting country.

Form of the request

The request must be made in writing, but an oral request may be acceptable if it is later confirmed in writing.

Content of the request

Constructing the request in a complete and comprehensive manner is very important. The request should be as detailed as necessary and contain all the relevant facts, so that the Competent Authority of the receiving State is well aware of the needs of the requestor and can deal with the request in the most efficient manner. An incomplete request will increase delays since the foreign Competent Authority may have to ask for more details to properly respond to the request.

Checklist of what may be included in a request: (note that exchanges should not be delayed by endeavoring to obtain every item on the checklist)

- the reference to the relevant article of the relevant treaty;
- if there are doubts as to the relevant legal basis, refer the matter to the Competent Authority;
- the name, date of birth if known (in case of individuals), Tax Identification Number and addresses of the taxpayer being examined;
- the name, Tax Identification Number (if known) and addresses of the foreign taxpayer or entity involved in the request, the registration number of the legal entity involved (if known);
- the connection between all entities involved (diagrams should be included wherever possible);
- relevant background information;
- types of taxes involved;
- the tax periods under examination (day, month, year they begin and end);
- the tax periods for which information is requested (if different from the years examined, give the reasons why);
- the information requested (indicate whether a trade or business secret is involved)
- if the information involves a payment via an intermediary, indicate the name of the intermediary;

- the tax purpose of the request (the legal issue or the factual issue involved, whether the information is required for the application of the tax treaty or the domestic legislation);
- the name and address of the bank branch as well as the bank account number when bank information is requested;
- the currency involved whenever figures are mentioned;
- the urgency of the reply (including the date after which the information may no longer be used);
- whether a translation should be provided, if possible (in urgent cases, mentioning that no translation is required, may expedite the exchange);
- the stage of the procedure in the requesting State, etc.;
- all other information considered pertinent (invoices, contracts, etc.);
- the name and phone number of the tax official who may be contacted if needed;
- if copies of documents or bank records are requested, what type of authentication is necessary, if any;
- if the information is likely to be used in court in a certain form, that form should be indicated to the treaty partner; and
- indicate if it is a case where the taxpayer should not be alerted or notified since it may endanger the investigation and the reasons for it (for instance in a case of fraud).

Note: Abbreviations should not be used.

If the country receiving the request has established a checklist (as it is for instance in the United States), it is advisable to follow that checklist. The initiator of a specific request should take care to be as complete and as accurate as is possible. The timeliness and completeness of response is largely dependent upon what is received to consider. At a minimum, the name of the taxpayer, type of tax, year(s) under examination to include a statement to that effect, the specific information requested and the relevancy of that information to the examination should all be included.

Language

The request should be drafted in a simple and clear manner, in the native language and accompanied if possible with a translation into the language of the receiving State. The translation should be left to the Competent Authority if the foreign language skills are not sufficient at the local level. Special problems involve the translation of attached documents such as agreements, business correspondence, invoices, etc. If no translation is provided, the relevant elements should be identified, so that the receiving State does not waste time translating information which is irrelevant to answer the request.

General Procedure

The request should be forwarded to the Competent Authority through the normal official channels. See Exhibit VII to determine the exact address depending on the country where the information is to be obtained. The Competent Authority will address the request to the foreign Competent Authority after reviewing the request for accuracy and completeness. See Exhibit V for an example of a Competent Authority letter transmitting the District request. It should be pointed out that the transmittal letter is prepared by the Competent Authority or his/her delegatee (i.e.; RSR) not the district office.

When to expect a reply

The rapidity of the reply will depend on whether the information is available in the tax files or if it requires an investigation. There is no set rule, but certain countries have set internal time frames to answer requests from treaty partners. For instance, some countries have agreed to a Code of Good Practice for exchanges of information on Multi-National Examinations which recommends a maximum of 3 months to answer requests involving law and practice or information contained in the tax administration's own records and 6 months otherwise. A reminder will be sent if no response is received and the Competent Authority deems it necessary.

Use of information received

The information received is to be used only for the purposes allowed by the bilateral tax convention or by the multilateral instrument under which the request was presented. Although in most countries, the taxpayer has a right to be informed of the basis for any adjustment, particularly one increasing the tax liability, there are circumstances under which the original document containing the foreign source information should not be shown to the taxpayer. Accordingly, the Competent Authority should be consulted before any original documents obtained through an exchange of information are disclosed to the taxpayer. In no instance is the actual Competent Authority letter transmitting the district request to be disclosed.

Responding to a request for information initiated by a foreign treaty partner

As indicated previously, the vehicle for requesting information has been negotiated between the United States and the treaty partner and has been ratified by Congress, and further, exists in the form of a Tax Treaty and/or Tax Information Exchange Agreement (TIEA). As such, and to maintain the United States's leadership role in this important program area, it is absolutely imperative that all reasonable efforts be made to secure the foreign requested information as expeditiously and completely as is possible. To that end, the action office responsible for securing the information should consider their involvement in the response process to be one of their highest priorities. Any summons activity, all of which are reviewed by the Associate Chief Counsel (International), should be pursued in an effective and efficient manner. Any delays or unusual difficulties arising during the information securing process

should be communicated to the applicable RSR or Treaty analyst so as to keep them informed of the progress of the case.

Interim response

As far as possible, the Competent Authorities should acknowledge receipt of the request and if possible, provide an estimate of the time needed to respond to the request. In those rare instances where partial responses are appropriate, due consideration should be made to providing an interim response.

Role of the Competent Authority: determining acceptability of the request; provide instructions to field officials

Upon receiving a foreign request, the Competent Authority will determine whether or not the request is acceptable. Items to consider include the following:

- whether it fulfills the conditions set in the exchange of information article or other relevant legal basis;
- whether it has been signed by the Competent Authority and includes all the necessary information to process the request;
- whether the information requested is of a nature which can be provided according to the laws of the receiving State;
- whether sufficient information is provided to identify the taxpayer;
- whether sufficient information is given to understand the request; and
- whether the confidentiality of the information provided is likely to be protected.

If the request is not acceptable, the requesting State should be informed as soon as possible. If it is acceptable, the Competent Authority will forward the request to the appropriate district office where the information is to be secured or the Director, Office of International Programs, if summons activity is indicated. The Competent Authority will provide the necessary instructions to gather the information requested and stress the urgency of the request if applicable.

The Competent Authority may also invite a representative of its counterpart to clarify the request or to attend the interview of the taxpayer or even to be present in a tax examination. Some countries do not allow a representative of a foreign country to be present in a tax examination, and only certain treaties allow a foreign tax official to attend an interview of a taxpayer.

Request addressed by a tax official from a foreign country directly to U.S. tax official

Local tax officials are not permitted to directly contact their foreign counterparts unless they have received a delegation of authority from their Competent Authority and an authorization

from the foreign Competent Authority. In rare instances, a U.S. tax official may receive a request which has by-passed one or both Competent Authorities. In such a case, the tax official should immediately refer the request, without activity, to the U.S. Competent Authority. The Competent Authority may reject the information request or ask his/her counterpart to resubmit the request through official channels. In that situation, the foreign Competent Authority will produce a new request in accordance with customary procedures.

Gathering of information requested

Gathering information for a treaty partner should be given a high priority since time is generally important and since this contributes to the same type of treatment in a reverse situation. If the information is not available, the treaty partner should be informed as soon as possible via the Competent Authority.

Information available in the tax files or taxpayer contact is required

In most countries, the governing principle is that the information is to be gathered as if it were for domestic purposes. Information requested may be of two types: information that is already at the disposal of the tax administration (tax return, income declared, expenses claimed, etc.) or it may be more time consuming and require a taxpayer interview, a tax investigation, or a third party contact. Additional information of a positive or negative nature which is likely to be useful to the requesting country should also be included in the response.

Standard time objectives

The time required to obtain tax information for purposes of a treaty partner depends on whether the information is available in the tax files or whether an investigation is necessary. Some countries have set maximum time limits within which information requested should be gathered (for example, three months if the information is available in the tax authority's own records and six months otherwise). With respect to certain areas like the financial sector, the time factor is crucial and exchange of information should be given an even higher priority when it concerns financial transactions. In general, when the gathering of information is likely to take longer than reasonably expected, an interim reply should be prepared and forwarded to the Competent Authority to inform the treaty partner of the delay.

Forwarding the information to the Competent Authority

In no instance will a U.S. tax administrator disclose information directly to a foreign treaty partner. All such exchanges of information are to be through the RSR or the Assistant Commissioner (International). In order to expedite the process, and if language skills are available at the local level, a translation of the original response should be prepared in the language of the requesting State. If documents such as contracts are enclosed and cannot be translated, the relevant parts should be identified. Efforts should also be made to forward the

information in a form which meets the requesting State's needs, particularly if such use contemplates court activity and was mentioned in the original request.

Responding to the request

The Competent Authority will review the reply to determine if it is responsive and is fully within the limits of the treaty provision. If necessary, the Competent Authority will notify the taxpayer if required by domestic law. The Competent Authority will have the response translated. The forwarded information will include a statement as to the limits on the use of the information. If the information involves trade or business secrets, the Competent Authority may need to contact the requesting State in order to establish how the information is to be used and what protective measures that State has according to its internal procedures to protect such secrets. In responses where trade or business secrets may be disclosed or when a response would be contrary to public policy, the Competent Authority may elect not to provide the information. If there are objections to the original documents being disclosed to the taxpayer, the Competent Authority should inform the foreign Competent Authority accordingly.

Checklist of what to include in the response (note that exchanges should not be delayed by endeavoring to obtain every item on the checklist)

- ▶ the reference to the relevant article of the relevant treaty;
- ▶ the name, date of birth if known (in case of individuals), Tax Identification Number and addresses of the taxpayer examined;
- ▶ the name, Tax Identification Number (if known) and addresses of the foreign taxpayer or entity related to the request, and if known the registration number of the legal entity involved;
- ▶ relevant background information;
- ▶ type of taxes involved;
- ▶ the tax periods for which information is requested
- ▶ the information which was gathered (for money amounts indicate currency and whether a tax has been withheld plus the rate and amount of tax withheld);
- ▶ copies of the documents or records requested;
- ▶ the type of action taken to gather the information;
- ▶ additional information not requested but likely to be useful;
- ▶ the name, phone and fax numbers of the tax official who may be contacted if needed;
- ▶ reminder that the use of the information provided is governed by the treaty provisions;
- ▶ indication as to whether the taxpayer has been notified about the exchange;
- ▶ mention whether a trade or business secret is involved;
- ▶ mention whether feedback is requested on the usefulness of the information; and
- ▶ mention whether there are objections to notify the taxpayer or to the disclosure of the original response to the taxpayer.

note: Abbreviations should not be used.

Sending information spontaneously

Importance of spontaneous exchange

Spontaneous exchange of information involves providing a treaty partner with tax information which is assumed to be of interest to that treaty partner without having received a prior request for this information. Because of its nature, it is the form of exchange which is the most dependent upon local tax officials. This type of information is usually effective since it involves details detected and selected by a tax official of the sending State during an audit or investigation. The efficiency of a spontaneous exchange depends on the motivation and the initiative of the supplying State. It is therefore important that tax investigators forward to their Competent Authority information which seems useful to a treaty partner.

Focus on matters of importance

Spontaneous exchanges should be used for matters of importance either because of the amount of tax involved or because there is suspicion of tax evasion schemes which are likely to be used by other taxpayers.

Examples of information which may be provided spontaneously:

- ◆ Payments made to residents of the other country, when there is suspicion that the payments have not been reported;
- ◆ Business or payments which have been routed through third countries for tax evasion purposes;
- ◆ A tax reduction or exemption granted to a taxpayer which may give rise to a liability of tax or a tax increase;
- ◆ Transactions which involve residents of the other country;
- ◆ Pricing between related entities which does not conform to the arm's length standard; and
- ◆ Fraudulent schemes.

Checklist of what may be included when providing information spontaneously

- ☛ the reference to the relevant article of the relevant tax treaty or mutual assistance agreement;
- ☛ the name, date of birth if known (in case of individuals), Tax Identification Number and addresses of the taxpayer involved in the exchange;
- ☛ the name, Tax Identification Number (if known) and addresses of the foreign taxpayer or entity who is suspected not to have reported income;
- ☛ relevant background information and why it is assumed that the information may

- be of interest;
- ☛ taxes involved
- ☛ the tax periods for which information is provided;
- ☛ the information which was gathered (for money amounts, indicate currency and whether a tax has been withheld, including rate and amount);
- ☛ copies of relevant documents or records;
- ☛ the name, phone and fax numbers of the tax official who may be contacted if needed;
- ☛ reminder that the use of the information provided is governed by the treaty provisions;
- ☛ indication as to whether the taxpayer has been notified about the exchange;
- ☛ mention whether feedback is requested on the usefulness of the information;
- ☛ mention whether a trade or business secret is involved; and
- ☛ mention whether there are objections to the disclosure to the taxpayer of the original documents providing information.

Note: Abbreviations should not be used.

Receiving information provided spontaneously

When receiving a spontaneous exchange of information, the Competent Authority determines whether the information should be forwarded to the local tax authorities for action, and then forwards it.

LIST OF BILATERAL TAX CONVENTIONS & TAX INFORMATION
EXCHANGE AGREEMENTS (TIEAs) BETWEEN THE UNITED STATES
AND OTHER COUNTRIES AS OF JULY 31, 1997

	<u>TAX TREATY</u>	<u>TIEA</u>
Armenia	X	
Australia	X	
Austria	X	
Azerbaijan	X	
Barbados	X	X
Belarus	X	
Belgium	X	
Bermuda	X	X
Canada	X	
People's Republic of China	X	
Costa Rica		X
Cyprus	X	
Czech Republic	X	
Denmark	X	
Dominica		X
Dominican Republic		X
Egypt	X	
Finland	X	
France	X	
Georgia	X	
Germany	X	
Greece	X	
Grenada		X
Guyana		X
Honduras		X
Hungary	X	
Iceland	X	
India	X	
Indonesia	X	
Ireland	X	
Israel	X	
Italy	X	
Jamaica	X	X
Japan	X	
Kazakhstan	X	
Korea	X	
Kyrgyzstan	X	
Luxembourg	X	

Marshall Islands		X
Mexico	X	X
Moldova	X	
Morocco	X	
Netherlands	X	
Netherlands Antilles	X	
New Zealand	X	
Norway	X	
Pakistan	X	
Philippines	X	
Poland		X
Portugal	X	
Peru		X
Romania	X	
Russia	X	
Slovak Republic	X	
Spain	X	
St. Lucia		X
Sweden	X	
Switzerland	X	
Tajikistan	X	
Trinidad & Tobago	X	X
Turkmenistan	X	
Tunisia	X	
Ukraine	X	
United Kingdom	X	
Uzbekistan	X	

SOURCE: The Bureau of National Affairs, Inc. - September 12, 1997

COMMENTARY ON ARTICLE 26 CONCERNING THE EXCHANGE OF INFORMATION

1. Preliminary remarks

1. There are good grounds for including in a convention for the avoidance of double taxation provisions concerning co-operation between the tax administrations of the two Contracting States. In the first place it appears to be desirable to give administrative assistance for the purpose of ascertaining facts in relation to which the rules of the convention are to be applied. Moreover, in view of the increasing internationalization of economic relations, the Contracting States have a growing interest in the reciprocal supply of information on the basis of which domestic taxation laws have to be administered, even if there is no question of the application of any particular article of the Convention.
2. Therefore the present Article embodies the rules under which information may be exchanged to the widest possible extent, with a view to laying the proper basis for the implementation of the domestic laws of the Contracting States concerning taxes covered by the Convention and for the application of specific provisions of the Convention. The text of the Article makes it clear that the exchange of information is not restricted by Article 1, so that the information may include particulars about nonresidents.
3. The matter of administrative assistance for the purpose of tax collection is not dealt with in the Article. This matter is dealt with in the Convention on Mutual Administrative Assistance in Tax Matters, a multilateral convention that entered into force April 1, 1995. This Convention was drawn up within the Council of Europe on the basis of a first draft prepared by the Committee on Fiscal Affairs and is open to the signature of the Member States of the Council of Europe and Member countries of the OECD. This matter can also form the subject of a separate bilateral agreement that can be negotiated between the Contracting States on the basis of the Model Convention for Mutual Administrative Assistance in the Recovery of Tax Claims adopted by the Committee on Fiscal Affairs on June 29, 1979; alternatively, provisions on assistance in the field of tax collection may be introduced in a double taxation convention, whenever Contracting States find it preferable.
4. Experience between 1963 and 1977 had shown that the text of the Article in the 1953 Draft Convention left room for differing interpretations. Therefore, it was felt desirable to clarify its meaning in the 1977 Model Convention by a change in the wording of the Article and its Commentary without altering its effects. Apart from a single point of substance (cf. paragraph 13 below) the main purpose of the changes made has been to remove grounds for divergent interpretations.

II. Commentary on the provisions of the Article

Paragraph 1

5. The main rule concerning the exchange of information is contained in the first sentence of the paragraph. The competent authorities of the Contracting States shall exchange such information as is necessary to secure the correct application of the provisions of the Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention even if, in the latter case, a particular Article of the Convention need not be applied. In order to keep the exchange of information within the framework of the Convention, a limitation to the exchange of information is set so that information should be given only insofar as the national tax in question is covered by the Convention and the taxation under the domestic taxation laws concerned is not contrary to the Convention. An illustration may be cited in this connection: a request for information concerning the imposition of a sales tax need not be complied with by the requested State as it is not covered by the Convention.

6. The following examples may clarify the principle dealt with paragraph 5 above. In all such cases information can be exchanged under paragraph 1.

7. Application of the Convention

- a) When applying Article 12, State A where the beneficiary is resident asks State B where the payer is resident, for information concerning the amount of royalty transmitted.
- b) Conversely, in order to grant the exemption provided for in Article 12, State B asks State A whether the recipient of the amounts paid is in fact a resident of the last-mentioned State and the beneficial owner of the royalties.
- c) Similarly, information may be needed with a view to the proper allocation of taxable profits between associated companies in different States or the adjustment of the profits shown in the accounts of a permanent establishment in one State and in the accounts of the head office in the other State (Articles 7, 9, 23 A and 23 B).

8. Implementation of the domestic laws

- a) A company in State A supplies goods to an independent company in State B. State A wishes to know from State B what price the company in State B paid for the goods with a view to a correct application of the provisions of its domestic laws.
- b) A company in State A sells goods through a company in State C (possibly a low-tax country) to a company in State B. The companies may or may not be associated. There is no convention between State A and State C, nor between State B and State C. Under the convention between A and B, State A, with a view to ensuring the correct application of the provisions of its

domestic laws to the profits made by the company situated in its territory, asks State B what price the company in State B paid for the goods.

- c) State A, for the purpose of taxing a company situated in its territory, asks State B, under the convention between A and B, for information about the prices charged by a company in State B, or a group of companies in State B with which the company in State A has no business contacts in order to enable it to check the prices charged by the company in State A by direct comparison (e.g. prices charged by a company or a group of companies in a dominant position). It should be borne in mind that the exchange of information in this case might be a difficult and delicate matter owing in particular to the provisions of sub-paragraph c) of paragraph 2 relating to business and other secrets.

9. The rule laid down in paragraph 1 allows information to be exchanged in three different ways:

- a) on request, with a special case in mind, it being understood that the regular sources of information available under the internal taxation procedure should be relied upon in the first place before a request for information is made to the other State;
- b) automatically, for example when information about one or various categories of income having their source in one Contracting State and received in the other Contracting State is transmitted systematically to the other State (see OECD Council Recommendation C(81)39/Final (5 May 1981) ("Recommendation of the Council Concerning a Standardized Form for Automatic Exchanges of Information under International Tax Agreements") and OECD Council Recommendation C(92)50/Final (23 July 1992) ("Recommendation of the Council Concerning a Standard Magnetic Format for Automatic Exchange of Tax Information"), both of which are discussed in "Tax Information Exchange Between OECD Member Countries: A Survey of Current Practices", OECD, Paris, 1994);
- c) spontaneously, for example in the case of a State having acquired through certain investigations, information which it supposes to be of interest to the other State.

10. The manner in which the exchange of information agreed to in the Convention will finally be effected can be decided upon by the competent authorities of the Contracting States.

11. Reciprocal assistance between tax administrations is feasible only if each administration is assured that the other administration will treat with proper confidence the information which it will receive in the course of their co-operation. At the same time

maintenance of such secrecy in the receiving Contracting State is a matter of domestic laws. It is therefore provided in paragraph 1 that information communicated under the provisions of the Convention shall be treated as secret in the receiving State in the same manner as information obtained under the domestic laws of that State. Sanctions for the violation of such secrecy in that State will be governed by the administrative and penal laws of that State.

12. The information obtained may be disclosed only to persons and authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Convention. This means that the information may also be communicated to the taxpayer, his proxy or to the witnesses. The information received by a Contracting State may be used by such persons or authorities only for the purposes mentioned in paragraph 1. If the information appears to be of value to the receiving State for other purposes than those referred to, that State may not use the information for such other purposes but it must resort to means specially designed for those purposes (e.g. in case of a non-fiscal crime, to a treaty concerning judicial assistance).

13. Under this Article, information may not be disclosed to authorities that supervise the general administration of the Government of a Contracting State, but are not involved specifically in tax matters. In their bilateral negotiations, however, Member countries may agree to provide for disclosure to such supervisory bodies.

14. As stated above, the information obtained can be communicated to the persons and authorities mentioned but it does not follow from this that it can be disclosed by them in court sessions held in public or in decisions which reveal the name of the taxpayer. The last sentence of the paragraph, however, opens up this possibility. Once information is used in public court proceedings or in court decisions and thus rendered public, it is clear that from that moment such information can be quoted from the court files or decisions for other purposes even as possible evidence. But this does not mean that the persons and authorities mentioned in paragraph 1 are allowed to provide on request additional information received. If either or both of the Contracting States object to the information being made public by courts in this way, or, once the information has been made public in this way, to the information being used for other purposes, because this is not the normal procedure under their domestic laws, they should state this expressly in their convention.

Paragraph 2

15. This paragraph contains certain limitations to the main rule in favor of the requested State. In the first place, the paragraph contains the clarification that a Contracting State is not bound to go beyond its own internal laws and administrative practice in putting information at the disposal of the other Contracting State. However, types of administrative measures authorized for the purpose of the requested State's tax must be utilized, even though invoked solely to provide information to the other Contracting State.

Likewise, internal provisions concerning tax secrecy should not be interpreted as constituting an obstacle to the exchange of information under the present Article. As mentioned above, the authorities of the requesting State are obliged to observe secrecy with regard to information received under this Article. A Contracting state that under its domestic law is required to notify the taxpayer that an exchange of information is proposed should inform its treaty partners in writing that it has this requirement and what the consequences are for its obligations in relation to mutual assistance.

16. Furthermore, the requested State does not need to go so far as to carry out administrative measures that are not permitted under the laws or practice of the requesting State or to supply items of information that are not obtainable under the laws or in the normal course of administration of the requesting State. It follows that a Contracting State cannot take advantage of the information system of the other Contracting State if it is wider than its own system.

17. Information is deemed to be obtainable in the normal course of administration if it is in the possession of the tax authorities or can be obtained by them in the normal procedure of tax determination, which may include special investigations or special examination of the business accounts kept by the taxpayer or other persons, provided that the tax authorities would make similar investigations or examination for their own purposes. This means that the requested State has to collect the information the other State needs in the same way as if its own taxation was involved, under the proviso mentioned in paragraph 15 above.

18. The requested State is at liberty to refuse to give information, in the cases referred to in the paragraphs above. However if it does give the requested information, it remains within the framework of the agreement on the exchange of information which is laid down in the convention; consequently it cannot be objected that this State has failed to observe the obligation to secrecy.

19. If the structure of the information systems of two Contracting States is very different, the conditions under sub-paragraphs a) and b) of paragraph 2 will lead to the result that the Contracting States exchange very little information or perhaps none at all. In such a case, the Contracting States may find it appropriate to broaden the scope of the exchange of information.

20. In addition to the limitations referred to above, sub-paragraph c) of paragraph 2 contains a reservation concerning the disclosure of certain secret information. Secrets mentioned in this subparagraph should not be taken in too wide a sense. Before invoking this provision, a Contracting State should carefully weigh if the interests of the taxpayer really justify its application. Otherwise it is clear that too wide an interpretation would in many cases render ineffective the exchange of information provided for in the CONVENTION. The observations made in paragraph 17 above apply here as well. The requested State in protecting the interests of its taxpayers is given a certain discretion to refuse the requested information, but if it does supply the information deliberately the taxpayer cannot allege an infraction of the rules of secrecy. It is open to the Contracting

States to add further dispensations from the obligation to supply information to the items listed in sub-paragraph c), for example, information protected by provisions on banker's discretion. It has been felt necessary also to prescribe a limitation with regard to information which concerns the vital interests of the State itself. To this end, it is stipulated that Contracting States do not have to supply information the disclosure of which would be contrary to public policy (*ordre public*).

Observations on the Commentary

21. *Japan* wishes to indicate that with respect to paragraph 11 above, it would be difficult for *Japan*, in view of its strict domestic laws and administrative practice as to the procedure to make public the information obtained under the domestic laws, to provide information requested unless a requesting State has comparable domestic laws and administrative practice as to this procedure.

22. Contrary to the interpretation put forward in paragraphs 14 to 16 above, *Japan* and the *United Kingdom* take the view that the Article imposes no obligation on them to carry out enquiries on behalf of a Contracting State in cases where no liability to their own tax is at issue, since to carry out such enquiries would be contrary to their laws and administrative practice.

23. [Merged with paragraph 21 on 31 March 1994; see HISTORY]

Reservations on the Article

13. *Portugal* reserves the right to apply Article 26 of the 1963 version of the draft CONVENTION.

14. *Switzerland* reserves its position on this Article. When negotiating with other Member countries, *Switzerland* will propose to limit the scope of this Article to information necessary for carrying out the provisions of the CONVENTION.

15. *Mexico* and the *United States* reserve the right to extend the application of this Article to all taxes imposed by a Contracting State, not just taxes covered by the CONVENTION pursuant to Article 2.

NORMAL TAX YEAR FOR INDIVIDUALS AND CORPORATIONS
IN OECD MEMBER COUNTRIES**

COUNTRY	CALENDAR YEAR	OTHER
Australia		1st July - 30th June
Austria	X	
Belgium	X	
Canada	X	
Denmark	X	
Finland	X	
France	X	
Germany	X	
Greece	X	1st July - 30th June (1)
Ireland	X	6th April - 5th April
Iceland	X	
Italy	X	
Japan	X	
Luxembourg	X	
Mexico	X(1)	
Netherlands	X	
New Zealand		1st April - 31st March
Norway	X(1)	
Portugal	X(1)	
Spain	X	
Sweden	X	
Switzerland	X(2)	
Turkey	X	
United Kingdom		6th April - 5th April
United States	X	

**Tax year: Year of assessment of tax and not budgetary year.

(1) for enterprises keeping double-entry accounting

NOTES

To process foreign source information, the recipient country should be aware of the tax year of the sending country for statute of limitation purposes.

X For corporations the tax year corresponds to the accounting or financial year which generally corresponds to the calendar year but which may differ in some cases.

X(1) The calendar year is mandatory for both individuals and corporations. In Austria and Portugal corporations may choose a different tax period upon authorization of the Ministry of Finance.

X(2) For corporations, the federal tax and most cantonal and municipal taxes are assessed over a period of two years but collected annually.

Time Limitation on Tax Reassessments

Country	General rule from date of original assessment	Reassessment may be carried out		Time limitation can be generally overridden by Double Taxation Treaty
		Where taxpayer has misrepresented information or tax fraud occurs (from date of original assessment)	Where taxpayer has not misrepresented information or tax fraud occurs (from date of original assessment)	
Australia	3 years.	No limit (fraud).	No limit (fraud).	A Privacy Act is in force. Complaints about privacy can be made to the Privacy Commissioner, who can order damages paid and direct government agencies to change their practices or procedures where appropriate.
Austria	5 years.	10 years (fraud).	10 years (fraud).	Yes.
Belgium	3 years (from the 1st January of the assessment year).	5 years (from the 1st January of the assessment year).	5 years (from the 1st January of the assessment year).	Yes.
Canada	3 years.	No limit (fraud).	No limit (fraud).	Generally not (occurs in some limited circumstances).
Denmark	5 years. 3 years (discretionary basis).	Longer than the general rule.	Longer than the general rule.	Yes.
Finland	2 years.	5 years.	5 years.	No.
France	3 years.	3 + 2 years (criminal case).	3 + 2 years (criminal case).	No.
Germany	4 years.	10 years (in general).	10 years (in general).	Yes (if it is favourable for the taxpayer).
Greece	3 years (from the date final assessment).	10 years.	10 years.	No.
Ireland	10 years (general rule). 6 years (self-assessment cases).	No limit (fraud or neglect).	No limit (fraud or neglect).	Yes.
Italy	5 years for income tax (6 in no tax return). 4 years for VAT (5 in no tax return).	Same limits.	Same limits.	No.
Japan	3 years (from due date of filing of return). 5 years (in the case of no return).	7 years.	7 years.	No.

Time Limitation on Tax Reassessments

Country	Reassessment may be carried out:			Time limitation can be generally overridden by Double Taxation Treaty
	General rule from date of original assessment	Where taxpayer has misrepresented information or tax fraud occurs (from date of original assessment)	Reassessment may be carried out:	
Netherlands	5 years	5 years (criminal offence 12 years)		Yes.
New Zealand	4 years (increase). 8 years (refund).	No limit (fraud).		No.
Norway	10 years.	No limit.		Yes.
Portugal	5 years (refund). 5 years (increase).	5 years.		Legally possible.
Spain	5 years.	5 years.		Generally, no.
Sweden	8 months	5 years. (longer in case of tax fraud)		Yes.
Switzerland	5 years	5 years		No.
Turkey	5 years	5 years		No.
United Kingdom	6 years	20 years		No.
United States	A minimum of 3 years.	6 years (substantial omission of income without intent to defraud). No limit (fraud).		Generally, no.

From the OECD publication "Taxpayers' rights and obligations: a survey of the legal situation in OECD countries," 1990 updated tables. Table 18